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The question as to the opening of the World's Fair on Sunday may be regarded as set at rest by the decision of the United States Circuit Court of Appeals at Chicago. The judges were unanimous in their decision. The grounds of the decision were briefly stated by Chief Justice Fuller, who presided in the court, the publication of the full text of the opinion of the court being postponed for want of time. The case came up on appeal from the decision of the Federal Circuit Court at Chicago, where the attorney of the United States for the Northern District of Illinois filed a bill asking that the World's Fair directory be enjoined from opening the exposition to the public on Sundays. The circuit court, it will be remembered, decided in favor of granting the injunction. This decision has now been overruled.

The principal ground upon which the decision was based is that it was not charged that any property interests of the complainant would be affected by the present action nor was there any allegation of irreparable injury or probable loss by reason thereof. The court found no tenable grounds for excepting the case from the ordinary rule which requires, in order to the exercise of jurisdiction in chancery by injunction, some injury to property, whether actual or prospective, some invasion of property or civil rights, and some injury irreparable in its nature, which cannot be redressed at law.

Ohio practitioners will be especially interested in the recent decision of Baltimore & Ohio Railroad Co. v. Baugh, by the Supreme Court of the United States upon appeal from the United States Circuit Court of Ohio. In deciding that a railroad company is not responsible for a personal injury to one of its fireman caused by the negligence of its locomotive engineer, who, under the rules of the company, was in charge of a detached engine, they flatly refused to follow the decisions of the Ohio Supreme Court, establishing the doctrine of liability of railroad companies for injuries to an employee through the negligence of another employee standing in a superior position to him. Mr. Justice Brewer in an exceedingly well written and ingenious opinion takes the position that the question in the case is not one of local law, to be settled by an examination merely of the decisions of the Supreme Court of Ohio, the State in which the cause of action arose, but is rather one of general law, to be determined by a reference to all the authorities and a consideration of the principles underlying the relations of master and servant. Having thus put themselves into a position where they may ignore the Ohio rule, the court enters into an exhaustive discussion of the main question, somewhat hampered, however, by their own previous ruling in Railroad Co. v. Ross, wherein is laid down the proposition that a conductor of a railroad train, who has a right to command the movements of a train and control the persons employed upon it, represents the company while performing those duties and does not bear the relation of fellow-servant to the engineer and other employees on the train. The effect and bearing of this decision upon the present controversy in view of a rule of the company which makes an engineer of a single engine in effect, its conductor, is very neatly, if not logically discounted, by the statement that the argument gives a potency to the rule of the company which it does not possess; that the regulations of a company cannot make the conductor a fellow-servant with his subordinates and thus overrule the law announced in the Ross case any more than it can, by calling some one else a conductor, bring a case within the scope of the rule there laid down. Besides, says the court, the Ross case did not hold that it was universally true that when one servant has control over another they cease to be fellow-servants within the rule of the master's exemption from liability, but did hold that an instruction couched in such general language was erroneous when applied to the case of a conductor having exclusive control of a train in relation to other employees of the company acting under him on the same train. In fact, the court, in the present case, though not willing to overrule or repudiate the Ross case, seems anxious to limits its application and narrow its scope, for after referring to the proposition that the "control"

or "superintendence" which renders the company liable in these cases of negligence by a superior officer or representative of the company, can only be applied to the different distinct departments of service, Justice Brewer calls attention to the fact that the conclusion in the Ross case was not reached by a unanimous court, four of its members being of the opinion that it was carrying the thought of a distinct department too far to hold it applicable to the management of a single train.

Mr. Justice Field dissents from the view of the court in the present case, in a vigorous opinion. He not only thinks the court should follow the well settled Ohio rule, but he believes, as doubtless many will, that the opinion of the majority not only limits and narrows the doctrine of the Ross case, but in effect denies even with the limitations placed by them upon it, the correctness of its general doctrine, and asserts that the risks which an employee of a company assumes from the service which he undertakes, is the negligence of one in immediate control as well as that of a co-worker and that there is no superintending agency for which a corporation is liable, unless it extends to an entire department of service.

To us, the Ohio rule seems to be eminently just and humane and we join with Justice Field in the regret that "the tendency of the decision of the majority of the court in this case is in favor of the largest exemption of corporations from liability." It may be well to note that the injury in the Baugh case occurred before the passage of an act by the Ohio legislature which makes the "superior officer" rule as laid down by the Ohio Supreme Court a statutory provision.

NOTES OF RECENT DECISIONS.

NEGOTIABLE INSTRUMENT—NOTE SIGNED BY AGENT—PAROL EVIDENCE.—The case of Keidan v. Winegar, 54 N. W. Rep. 901, decided by the Supreme Court of Michigan, is the latest addition to the conflict of authority on the question of the personal liability of one signing a note as agent or trustee. Not long ago—36 Cent. L. J. 261—we reported with annotation the Iowa case of Matthews v. The Dubuque Mattress Co., wherein the strict doctrine of personal liability is followed. In the Michigan case now at hand it is held that where the maker of a note affixes to his signature the word "agent" parol evidence is admissible as between the immediate parties to the instrument to prove that the maker executed the note in a representative capacity and that it was so understood by the payee.

NEGOTIABLE INSTRUMENT—NOTE—STIPULATION FOR ATTORNEYS' FEE.—The Supreme Court of Oregon in Benn v. Kutzschan, hold with the weight of authority that a stipulation in a promissory note for the payment of a reasonable attorneys' fee in case of suit does not destroy its negotiability. They say that a careful examination has satisfied them that the weight of authority, and especially of the more recent decisions, is strongly in favor of the doctrine that the negotiability of a promissory note is in no way affected by a stipulation for a reasonable attorney's fee. This is the doctrine in the States of Arkansas, Dakota, Illinois, Indiana, Iowa, Kansas, Louisiana, Montana, Nebraska, and Texas, and also in the general trend of the decisions in the federal courts. Trader v. Chidester, 41 Ark. 242; Bank v. Rasmussen, 1 Dak. 60, 46 N. W. Rep. 574; Nickerson v. Sheldon, 33 Ill. 373; Smith v. Bank, 29 Ind. 158; Stoneman v. Pyle, 35 Ind. 103; Sperry v. Horr, 32 Iowa, 184; Seaton v. Scovill, 18 Kan. 433; Dietrich v. Bayhi, 23 La. Ann. 767; Bank v. Fuqua, 11 Mont. 285, 28 Pac. Rep. 291; Heard v. Bank, 8 Neb. 10; Washington v. Bank, 64 Tex. 4; Sewing Mach. Co. v. Moreno, 6 Sawy. 35, 7 Fed. Rep. 806; Adams v. Addington, 16 Fed. Rep. 89; Mortgage Co. v. Downing, 17 Fed. Rep. 660; Hughitt v. Johnson, 28 Fed. Rep. 865; Farmers' Nat. Bank v. Sutton Manuf'g Co., 52 Fed. Rep. Rep. 191, 3 C. C. A. 1; Howenstein v. Barnes, 5 Dill. 482; Schlesinger v. Arline, 31 Fed. Rep. 648. The contrary decisions in Missouri, Minnesota, North Carolina and Pennsylvania it would be useless to consider or attempt to distinguish. From the position that a stipulation for a reasonable attorney's fee in no way impairs the negotiability of a note, it would seem logically and necessarily to follow that the indorser of such a note is just as liable for the attorney's fee as for the principal of the note. An indorser, by his contract of indorsement, promises,

among other things, that he will discharge the note according to its tenor, upon due presentment and notice. "It is a fresh, substantial contract," says Mr. Daniel, "embodying all the terms of the instrument indorsed in itself." 1 Daniel, Neg. Inst. § 669. And see Van Vleet v. Sledge, 45 Fed. Rep. 753.

CRIMINAL LAW—FORGERY.—The Court of Criminal Appeals of Texas, decides in the case of Brewer v. State, that it is forgery to sign a dead person's name to an instrument with intent to defraud. It was contended on behalf of the defense that inasmuch as the party whose name was forged was dead at the time his name was signed to the check, therefore the making of the false instrument cannot constitute the crime of forgery. The court thought the authorities do not sustain this position. On the other hand, the contrary doctrine has been held to be the correct one and adhered to wherever the question has been adjudicated. Henderson v. State, 14 Tex. 503; Billings v. State, 107 Ind. 57. It has also been held that he who signs the name of a person who had or has no legal capacity to make the instrument is guilty of forgery. People v. Krummer, 4 Parker Crim. R. 217.

EMPLOYER'S LIABILITY—SALESMAN — ARREST.—The Supreme Court of Rhode Island held, in the recent case of Staples v. Schmid, that it was within the scope of the employment of a salesman, left in charge of his employer's store, to cause the arrest of persons for stealing therefrom, and that the employer was liable for the action of the salesman in causing the arrest of a person on suspicion of theft. The court said *inter alia:*

The servant in this case was left with an assistant in charge of his master's store. His ordinary duties undoubtedly were to show goods, and to sell them to customers. It was, however, equally his duty to protect his master's property from pilfering. The acts complained of were evidently done with that intention. The arrest was for the purpose of searching and for recovering the master's property, not with the object of punishing crime against the public. The establishment was not a railroad station, where the multiplicity of employees confines each one to a narrow round of duties, where special officers are stationed to preserve order, and detain criminals, nor a large dry goods emporium, where detectives and watchmen are employed to guard against thieves. The servant here was salesman and custodian in one. Whatever the master might do in the protection of his property he expected his servant to do in his absence. If the servant had seen the plaintiff take up and secrete the package of spoons in question, and had allowed her to walk away with them unmolested, could any one say that he had not been derelict in his duty to his master? If, in the performance of his duty, he mistook the occasion for it, or exceeded his powers, or employed an improper degree of compulsion, the mistake and the excess must be answered for by the master.

INSURANCE—HARVESTING MACHINE. — In Mawhinney v. Southern Ins. Co., 32 Pac. Rep. 945, decided by the Supreme Court of California, which was an action on a fire insurance policy on a harvesting machine while "operating in the grain fields and in transit from place to place in connection with harvesting" in a certain county, it appeared that the machine was moved, the day after the policy was issued from the place where it had been stored since the previous harvesting season, to a blacksmith shop, to be repaired in order to fill contracts for cutting grain. While near such shop, eight days after being taken thereto, and about the day the harvesting season commenced, the machine was burned. It was held that it was not "operating in grain fields," or "in transit from place to place in connection with harvesting," at the time it was destroyed. Patterson, J., dissented. The court said:

The harvester was not "operating in the grain fields," or "in transit from place to place in connection with harvesting," at the time it was destroyed. It had not been used at all in connection with harvesting during that season, and the testimony of Barrett that it required about two weeks to make such repairs as would put it in condition to be used shows that it could not have been, at the time of the loss, in transit from place to place "in connection with harvesting." The policy purported to be on a "threshing outfit in the field," and its terms did not cover the harvester while it was at a blacksmith shop for repairs, and it cannot be said that while it was at the shop in Fresno, to which it had been taken for the purpose of putting it in repairs for the season, it was in transit "from place to place, in connection with harvesting," any more than if it had been sent to San Francisco for repairs, and had been there destroyed. An insurer is not liable except upon proof that the loss has occurred within the terms of the policy, and when making the policy he is at liberty to select the character of the risk he will assume. If the terms of this risk are distinct, and without ambiguity, the assured cannot complain if the risk assumed does not cover the loss. The locality of the property, as well as its custody, and the incidental care that, by reason of such locality and custody, the property will naturally receive, are elements which enter into a consideration of the risk to be assumed; and, if they are made a part of the conditions of the policy they must be observed by the assured, as fully as any other conditions, before the insurer can be made liable for a loss. In the present case the insurer would reasonably assume that the harvester would be under greater care and watchfulness

while it was actually operating in the fields, or in transit from place to place for such purpose, than if left standing, unhoused and uncared for, in open grounds near a blacksmith shop. But whatever may have been the motives for limiting the extent of his risk, he cannot be made liable for a loss that was not covered by the risk assumed in the policy.

LIMITATIONS OF ACTIONS—CONFLICT OF LAWS—PLEADING STATUTES.—The Supreme Court of Nebraska, in Minneapolis Harvester Works v. Smith, decide that where a person is a resident of another State when a cause of action accrued against him, and afterwards, but before the debt has become barred by the statute of such State, he becomes a resident of Nebraska, the statute of limitations will commence to run in his favor here from the date of his coming into the State, and not before. In December, 1881, the defendant, a resident of the State of Iowa, gave the plaintiff his promissory note, due January 1, 1884, and payable in that State. He removed to Nebraska in 1888, and suit was commenced on the note in this State on July 13, 1891. It was held the action was not barred. In pleading the statute of limitations of a foreign State is unnecessary to set out in the pleading an exact copy thereof, or to give its title and date of approval. It is sufficient, as against a general demurrer, to allege the substance of the statute relied on. Norval, J., says:

We do not think that the action is barred by the statute of this State. By section 20 of the Code of Civil Procedure it is provided that "if, when a cause of action accrues against a person, he be out of the State, or shall have absconded or concealed himself, the period limited for the commencement of the action shall not begin to run until he come into the State, or while he is absconded or concealed; and if, after the cause of the action accrues, he depart from the State, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought." This action was instituted on the 13th day of July, 1891, which was more than seven years after the maturity of the note; but it appears from the petition that the cause of action arose in the State of Iowa, and that the defendant had resided in this State only three years prior to the bringing of this suit. Under the provisions of the section quoted, the statute of limitation did not begin to run against the note in this State until the defendant moved to Nebraska. Since he had not, when suit was brought, been a resident of the State for five years, the note was not outlawed here. The time the note had run after its maturity, until the defendant moved into the State, cannot be added to the time of his residence here in order to create a bar of the statute. See Edgerton v. Wachter, 9 Neb. 500, 4 N. W. Rep. 85; Harrison v. Bank, 12 Neb. 490, 11 N. W. Rep. 752; Nicholas v. Farwell, 24 Neb. 180, 38 N. W. Rep. 820. Sections 18 and 21 of the Code read as follows: "Sec. 18. All actions, or causes of action, which are or have been barred by the laws of this State, or any State or territory of the United States, shall be deemed barred under the laws of this State." "Sec. 21. When a cause of action has been fully barred by the law of any State or country where the defendant has previously resided, such bar shall be the same defense in this State as though it had arisen under the provisions of this title." If the statute of limitations of the State of Iowa had run in favor of the defendant while he was yet a resident of that State, then, under the provisions of the above sections, this action must fail. We concede that, when a party relies upon a statute of another State to make out his cause of action or defense, he must plead the statute upon which he depends in the same manner he would any other facts. It will be observed in this case the petition alleges, and the demurrer admits the truth thereof, "that by the laws of Iowa the statute provides that an action of debt on a promissory note may be commenced within ten years from the time the cause of action accrues." Is the foregoing a sufficient pleading of the statute of Iowa? We think the allegations sufficient to authorize proof of the statute of limitations of that State. The averment is not the statement of a mere conclusion, but of a fact. While it is the better and safer practice, in pleading the statute of another State, to set out a copy thereof in the pleading, yet we think it sufficient to allege the substance of the statute desired. That, at least, was done in the case at bar. If the defendant wished a more specific allegation he should have moved to make the petition more definite and certain. If the statute of Iowa is insufficiently pleaded, the presumption would then be, until the contrary was made to appear, that the statute of limitations of that State relating to promissory notes is the same as our own, viz., five years. Inasmuch, therefore, as the petition shows that only four years had elapsed between the maturity of the note and the time the defendant moved to this State, the action was not barred at the time he became a resident here.

INJUNCTIONS AGAINST JUDGMENTS OF OTHER COURTS, STATE AND NATIONAL.

1. *As Between Courts of the Same State.*—The principle that equity will for sufficient reasons enjoin the enforcement of a judgment of a court of law is unquestioned.[1] Originally the courts of law and the courts of equity were entirely separate and distinct from one another, and then, of course, all judgments at law which were enjoined were necessarily the judgments of some other court. But in many States both legal and equitable jurisdictions are now vested in the same court, and the rule is not uniform as to whether, under the circumstances, one court will enjoin the judgment of a co-ordinate court. In California it was held that it will

[1] 2 Story, Eq. Juris., Secs. 876, 1570; 3 Pom. Eq. Juris., Sec. 1364.

not, and that a party entitled to relief against a judgment must bring his action in the court in which the judgment was rendered.[2] The rule is the same in Wisconsin,[3] in Indiana,[4] in Kentucky,[5] and by statute the same in Iowa and Texas.[6] These rulings are generally placed upon the ground that to permit one court to enjoin the judgments of another court of co-ordinate powers would lead to unseemly conflicts between them and work great confusion.[7] Experience, however, has proven that this danger is more imaginary than real, as the last court in no manner attempts to overrule or supervise the action of the first but acts only upon the parties,[8] and a conflict between them is an almost unheard of thing. Sometimes, under the peculiar circumstances, relief must be sought by supplementary proceedings in the same action,[9] and then, of course, another court can have no jurisdiction in the matter. But where the second action is a new and independent suit, as in many cases, especially where the judgment is attacked for fraud, it certainly is,[10] the venue of which is carefully regulated by statute, it would not seem that the courts have any right or power, except that of might, to require the action to be commenced or presented in any other court or county than that provided by law. In a case in New York,[11] it was held that since both legal and equitable jurisdiction is now vested in the same court, an action to enjoin a judgment at law must be commenced in the court in which the judgment was obtained; but in Erie Railway Co. v. Ramsey,[12] the Court of Appeals of that State broadly asserts the contrary view. Other courts hold the same,[13] and it would seem that the later doctrine as now maintained by the courts of the United States, concerning the right of one court to enjoin the judgments of another court, hereafter noticed, clearly supports the theory that all courts of equity have that jurisdiction, especially where fraud is the ground upon which relief is asked. Even where the rule that one court must not enjoin proceedings in another court is held the strictest, it is limited by the condition that the first court must be competent to grant the required relief.[14]

2. *Injunctions against Decrees in Equity.* —The courts are also in considerable conflict as to whether an injunction will be granted against proceeding under a decree rendered by another court of like jurisdiction and powers. Where it is held that it will not, it is generally placed upon the ground that to do so would lead to confusion and conflict, and that, owing to the flexibility of equitable proceedings, the aggrieved party can always obtain relief in the original action.[15] But the great weight of authority supports the right in a proper case to overhaul the decrees of other courts of equity, as well as judgments at law.[16] In fact, as suggested by Mr. High, and as has already been suggested concerning one court enjoining proceedings upon the judgment of another court, "upon principle it is difficult to perceive any satisfactory reason why the jurisdiction should not be extended to restraining the enforcement of decrees in chancery upon the same grounds and for like reasons as those which underly the jurisdiction in re-

[2] Anthony v. Dunlap, 8 Cal. 26, 27; Rickett v. Johnson, *Id.* 34, 35; Chipman v. Hibbard, *Id.* 268, 270; Gorham v. Toomey, 9 *Id.* 77; Uhlfelder v. Levy, *Id.* 607; Crowley v. Davis, 37 *Id.* 268; Flaherty v. Kelly, 51 *Id.* 145.

[3] Platto v. Denster, 22 Wis. 482, 484; Endter v. Lennon, 45 *Id.* 299; Orient Ins. Co. v. Sloan, 70 *Id.* 611, 615.

[4] Plunkett v. Black, 117 Ind. 14.

[5] Davis v. Davis, 10 Bush, 274.

[6] Anderson v. Hall, 48 Iowa, 346; Harrison Mach. Works v. Templeton, 82 Tex. 443. It is, however, held in each of those States that where the judgment is void it may be set aside by any court having equitable jurisdiction. Arnold v. Hawley, 67 Iowa, 313; Bender v. Damon, 72 Tex. 92.

[7] Anthony v. Dunlap, 8 Cal. 27; Platto v. Denster, 22 Wis. 482.

[8] 2 Story, Eq. Juris., Secs. 875, 1571; 2 Free. Judg. Sec. 485; 1 Black Judg., Sec. 357; State v. Engleman, 86 Mo. 551, 562; Given's Appeal, 121 Pa. St. 260, 265.

[9] Barrow v. Hunton, 99 U. S. 80, 82.

[10] Barrow v. Hunton, 99 U. S. 80, 82; Johnson v. Waters, 111 U. S. 640, 667; Marshall v. Holmes, 141 *Id.* 589, 596.

[11] Grant v. Quick, 5 Sandf. 612.

[12] 45 N. Y. 637, 648.

[13] Douglas v. Joyner, 1 Baxt. 32; Greenfield v. Hutton, *Id.* 216; *In re* Thomas Chadwell, 7 Heisk. 630; Baudon v. Beecher, 3 Cl. & Fin. 479; Manaton v. Molesworth, 1 Eden, 25.

[14] Anthony v. Dunlap, 8 Cal. 26; Crowley v. Davis, 37 *Id.* 268.

[15] Platto v. Denster, 22 Wis. 482; Endter v. Lennon, 46 *Id.* 299; Plunkett v. Black, 117 Ind. 14.

[16] Erie Railway Co. v. Ramsey, 45 N. Y. 648; Douglas v. Joyner, 1 Baxt. 32; Montgomery v. Whitworth, 1 Tenn. Ch. 174; Greenfield v. Hutton, 1 Baxt. 216; Oro Fino Co. v. Allen, 1 Idaho, 113; *In re* Thomas Chadwell, 7 Heisk. 630; Baudon v. Beecher, 3 Cl. & Fin. 479; Manaton v. Molesworth, 1 Eden, 25; Bowen v. Evans, 2 H. L. Cas. 257; 3 Pom. Eq. Juris., Sec. 1362*n.*; 2 Free. on Judg., Sec. 576.

straint of the enforcement of judgments at law."[17] As decrees in chancery are now generally enforced by execution the same as judgments, all the reason that once existed for applying a different rule to them has disappeared.[18] Wherever a new action must be commenced to obtain the desired relief, it can be as well commenced and tried in another court as the one in which the decree was obtained, and under these circumstances its venue should be determined by the ordinary statutes upon that subject.

3. *Injunctions against Judgments and Decrees of Superior Courts and Courts of Appeal.*—It seems like an anomalous proceeding for an inferior court to restrain the execution of judgments and decrees of superior courts and courts of appeal, but the right to do so in a proper case is well established by the great weight of authority. This jurisdiction is permissible upon the ground already stated that the chancery court, in restraining the execution of the judgment or decree, does not act upon the tribunal granting it, but upon the parties, and where, by reason of fraud or some other sufficient ground it becomes inequitable to enforce the judgment, the character of the tribunal in which it was obtained is entirely immaterial. Thus it is said by one of the standard writers: "In applying this rule it matters not whether the judgment impugned has been pronounced by an inferior or by the highest court of judicature in the realm, but in all cases alike it is competent for every court, whether superior or inferior, to treat as a nullity any judgment which can be clearly shown to have been obtained by manifest fraud."[19] Many adjudications support this proposition.[20] In this connection it should be remembered that the second court in nowise sits in review of the conclusions of the first. The purpose is not to retry the action, but to restrain the winning party from availing himself of a judgment or decree unfairly obtained, resulting from fraud, accident, mistake, or some other recognized ground of equitable relief, the execution of which is against conscience.[21] When the ground is fraud it must consist of extrinsic, collateral facts, not involved in the consideration of the merits, by which the successful party has prevented his adversary from presenting the merits of his case, or by which the jurisdictions of the court has been imposed upon.[22]

4. *Judgments and Decrees of Courts of Sister State.*—Since the cases of Pearce v. Olney,[23] and of Dobson v. Pearce,[24] were decided, there has not been much question but that the judgment of a court of a sister State stands in about the same position as a judgment by a domestic court, and that in a proper case, where the chancery court has jurisdiction of the parties, proceedings under the former may be enjoined. In the first mentioned case Olney, having obtained a money judgment against Pearce in the courts of New York, brought an action thereon in the courts of Conneticut. Thereupon Pearce applied for an injunction to restrain the prosecution of the action upon the ground that the judgment had been obtained by fraud, and the court finding that such was the case a perpetual injunction was granted. It was there said: "It is insisted that, under the constitution of the United States requiring full faith and credit to be given to the judicial proceedings of other States, it is not competent to the court to impeach the judgment of the Superior Court of New York. * * * There is no attempt to impeach the New York judgment. In granting an injunction against proceedings at law, whether in a foreign or domestic court, there is no difference; the court of equity does not presume to direct or control the court of law; but it considers the equities between the parties and acts upon the person, and restrains him from instituting or prosecuting an action.[25] Subsequently Pearce assigned the New York judgment to Dobson, who brought another action upon it in the courts of New York, but it was held: 1. That the fraud in procuring it was a good defense. 2. That the decree in Connecticut was conclusive evidence of the

[17] High on Injunctions, Sec. 270.

[18] Oro Fino Co. v. Allen, 1 Idaho, 113.

[19] Kerr on Fraud and Mistake, 294.

[20] State v. Engleman, 86 Mo. 551, 562; Pyett v. Hatfield, 15 Lea (Tenn.), 473; Boulton v. Scott, 2 Green's Ch. 231; Davis v. Bonar, 15 Iowa, 171; Massie v. Mann, 17 *Id.* 131; Wilson v. Montgomery, 14 S. & M. 205; Kohn v. Lorett, 43 Ga. 179; Bank v. Hancock, 6 Dana, 264; McClellan v. Crook, 4 Md. Ch. 398; Dringer v. The Receiver, 42 N. J. Eq. 573. *Contra:* Rashall v. Maxwell, Hempst. 25.

[21] Pearce v. Olney, 20 Conn. 544; Stanton v. Embry, 46 *Id.* 595; Little v. Price, 1 Md. Ch. 182; Payne v. O'Shea, 84 Mo. 129; Kinnier v. Kinnier, 45 N. Y. 635.

[22] U. S. v. Flint, 4 Saw. 42, 51, 77.

[23] 20 Conn. 544.

[24] 12 N. Y. 165.

[25] 20 Conn. 556.

fraud.[26] It has often been held that fraud in obtaining the judgment cannot be set up in defense to an action upon the judgment in the courts of a sister State,[27] or of the United States,[28] and some writers have fallen into the error of supposing that the ruling was that the question of fraud could not be raised at all in the other jurisdiction.[29] The ruling, however, seems founded solely upon the proposition that an action upon a judgment is an action at law, to which in many jurisdictions equitable defenses are not permitted, but the party is driven to a separate action, either upon the equitable side of the court or in another court having equitable powers. Where such equitable defenses are permitted, the fraud may be set up as a defense.[30] In some cases it has been held that the question of what defenses can be made to an action upon a sister State judgment depends upon what could be made to it in the State where obtained.[31] Usually, however, this consideration does not seem to cut much of a figure in determining the jurisdiction of the court.

5. *Judgments of State and United States Courts.*—It was at one time apparently well settled that the courts of one of these jurisdictions would not interfere with the judgments or decrees of the other. So far as the national courts were concerned such interference seemed expressly forbidden by statute,[32] and the converse proposition well sustained by the authorities.[33] But, notwithstanding this formidable array of cases and others to the same effect that might be cited, it may be confidently asserted from the later decisions, in which the distinctions have been more carefully drawn, particularly those by the Supreme Court of the United States, which tribunal must be considered the final arbiter of all such matters, that the jurisdiction does exist, and is well recognized and established, at least so far as setting aside and enjoining final judgments and decrees is concerned. The first case in which the new departure, which it seems to the writer to have been, was clearly made, was that of Gaines v. Fuentes,[34] decided in 1875. It was there held that although ordinarily courts of equity have no jurisdiction of a bill to set aside the probate of a will, yet where, as in Louisiana, such jurisdictions is by statute vested in the State courts of equity, the federal courts sitting in the State where such statute exist will also entertain concurrent jurisdiction in a case between proper parties. The doctrine was again announced and enlarged upon in Barrow v. Hunton,[35] where, in the course of the opinion by Justice Bradley, after stating that the question turned upon whether the proceeding there was in its nature a separate suit, or was a supplementary proceeding so connected with the origi-

[26] Dobson v. Pearce, 12 N. Y. 156. To the some effect are Engel v. Scheuerman, 40 Ga. 206; Stanton v. Embry, 46 Conn. 65; Conway v. Ellison, 14 Ark. 360; Turley v. Taylor, 6 Baxt. 376; Cole v. Cunningham, 133 U. S. 112; Bank of Australasia v. Nias, 4 Eng. Law & Eq. 252. *Contra:* Metcalf v. Gilmore, 95 N. H. 417; Wyoming Co. v. Mohler (Pa.), 17 Atl. Rep. 31; Bicknell v. Field, 8 Paige, 440; McRae v. Mattoon, 13 Pick. 53.

[27] Anderson v. Anderson, 8 Ohio, 108; Benton v. Burgot, 10 S. & R. 240; McDonald v. Drew, 64 N. H. 547; Sanford v. Sanford, 28 Conn. 6; Mason v. Messenger, 17 Iowa, 262; Hammond v. Wilder, 25 Vt. 342; Embery v. Connor, 3 Comst. 522; Carpentier v. Oakland, 30 Cal. 439.

[28] Christmas v. Russell, 5 Wall. 290; Maxwell v. Stewart, 21 *Id.* 71; Randolph v. King, 2 Bond, 104.

[29] Wells on Jurisdiction, Sec. 247.

[30] Rogers v. Gwinn, 21 Iowa, 59; Dunlap v. Cody, 31 *Id.* 260; Dobson v. Pearce, 12 N. Y. 156; Kerr v. Kerr, 41 *Id.* 272; Kinnier v. Kinnier, 45 *Id.* 535; Mandeville v. Reynolds, 68 *Id.* 528; Hunt v. Hunt, 72 *Id.* 217; Sharman v. Morton, 31 Ga. 45; Marx v. Fore, 51 Mo. 69; Ward v. Quinliven, 57 *Id.* 426; Keeler v. Elston, 22 Neb. 310; Brown v. Parker, 28 Wis. 21; Holt v. Alloway, 2 Blackf. 108; Payne v. O'Shea, 84 Mo. 129; 2 Black on Judg., Sec. 973. In Achsenbein v. Papelier, L. R. 8 Ch. 695, it was held that where a defense to a judgment upon the ground of fraud can be as well made at law as in equity no injunction will be granted. No American case to this effect has been found. The remedies where both are permissible are generally held to be concurrent. Brown v. Parker, 28 Wis. 21. In an action of interpleader, an injunction may be granted to stay proceedings instituted by one of the defendants against the plaintiff. Prudential Ass. Co. v. Thomas, L. R. 3 Ch. 74; Warington v. Wheatstone, Jac. 202; Sieveking v. Behrens, 2 Mylne & Cr. 581.

[31] Brown v. Parker, 28 Wis. 21; Barras v. Bidwell, 3 Woods, 5.

[32] 1 Stat. at Large 335.

[33] 1 High on Injunc., Sec. 266; 1 Black on Judg., Sec. 360; 2 Free. on Judg., Sec. 485; 10 Am. Eng. Ency. 912; Logan v. Lucas, 59 Ill. 237; Munson v. Harron, 34 *Id.* 422; Diggs v. Walcott, 4 Cranch, 179; McKim v. Vorhies, 7 *Id.* 279; Peck v. Jenness, 7 How. 612; Taylor v. Carryl, 20 *Id.* 583; Freeman v. Howe, 24 *Id.* 450; Randall v. Howard, 2 Black, 585; Riggs v. Johnson, Co. 6 Wall. 195; Christmas v. Russell, 5 Wall. 290; Maxwell v. Stewart, 22 Wall. 77; Hanley v. Donoghue, 116 U. S. 1; Simmons v. Saul, 138 *Id.* 458; Dorr v. Rohr, 3 Am. Stat. Rep. 114; Strozier v. Howes, 30 Ga. 578; Kindall v. Windsor, 6 R. I. 453; English v. Miller, 2 Rich. Eq. 320; Asborn v. Michigan, etc. R R., 2 Flipp. 503.

[34] 92 U. S. 10.

[35] 99 U. S. 80.

nal suit as to form an incident to it, and substantially a continuation of it, it was said: "If the proceeding is merely tantamount to the common law practice of moving to set aside a judgment for irregularity, or to a writ of error, or to a bill of review, or an appeal, it would belong to the latter category and the United States Court could not properly entertain jurisdiction of the case. * * * On the other hand, if the proceedings are [illegible] mount to a bill in equity to set aside a decree for fraud in the obtaining thereof, then they constitute an original and independent proceeding, and, according to the doctrine laid down in Gaines v. Fuentes, the case might be within the cognizance of the federal courts. The distinction between the two classes may be somewhat nice, but it may be affirmed to exist." Johnson v. Waters,[36] was an action brought in the United States Circuit Court to set aside and annul upon the ground of fraud the sale of the property of an estate made under the orders of a probate court. The desired relief was granted, and Gaines v. Fuentes and Barrow v. Hunton, was approved. It was there said:[37] "In such cases the court does not act as a court of review, nor does it inquire into any irregularities or errors of proceeding in another court; but it will scrutinize the conduct of the parties, and if it finds that they have been guilty of fraud in obtaining a judgment or decree, it will deprive them of the benefit of it, and of any inequitable advantage which they have derived under it." To the same effect is Arrowsmith v. Gleason,[38] a case similar to the last, where the question was again elaborately considered, and the same conclusion announced. The same ruling was again made in Marshall v. Holmes,[39] a clean cut case, so far as this point is concerned, where the plaintiff brought an action in a State court to set aside judgments fraudulently obtained against her in that court, and the question of jurisdiction arose upon a petition to remove the case to the United States Circuit Court, upon the ground of diverse citizenship of the parties. The court, after citing and reviewing the cases referred to herein, said: "These authorities would seem to place beyond question the jurisdiction of the circuit court to take cognizance of the present suit, which is none the less an original, independent suit, because it relates to judgments obtained in the court of another jurisdiction. While it cannot require the State court itself to set aside or vacate the judgments in question, it may, as between the parties before it, if the facts justify such relief, adjudged that Mayer shall not enjoy the inequitable advantage obtained by his judgments. A decree to that effect would operate directly upon him and would not contravene that provision of the statute prohibiting a court of the United States from granting a writ of injunction to stay proceedings in a State court." It seems, then, to be definitely and finally determined by this august tribunal that where an action brought to set aside a judgment or decree is a new and independent suit, the mere fact that it was obtained in a State court will not prevent a United States court from taking jurisdiction. This distinction should, however, be carefully noted, for if the proceeding be merely ancillary or supplementary to a pending action, it must be brought in the same court. The same jurisdiction exists in the State courts over the judgments of United States courts, for no higher sanctity can be claimed for those judgments than is due to judgments of the State courts under like circumstances.[40] These are all cases where the action was brought upon the ground of fraud, but it is not believed that this can make any difference, for the same jurisdiction would exist upon any other ground recognized as sufficient in equity to enjoin or annul a judgment or decree. The principle has been applied in many other cases.[41] Perhaps some notice should be taken of some modern decisions by the United States Supreme Court that are apparently in conflict with those cited. Notwithstanding the broad language used by

[36] 111 U. S. 640.
[37] Page, 667.
[38] 129 U. S. 86.
[39] 141 U. S. 589.

[40] Bigelow on Est., 201; Crescent Live Stock Co. v. Butchers' Union, 120 U. S. 141; Ralston v. Sharon, 51 Fed. Rep. 702.

[41] Sahlgard v. Kennedy, 1 McCrary, 29, 2 Fed. Rep. 295; Clark v. Hackett, 1 Cliff. 277; Ralston v. Sharon, 51 Fed. Rep. 702; Smith v. Schwed, 9 *Id.* 490; Hunt v. Fisher, 29 *Id.* 801; Yeatman v. Bradford, 44 *Id.* 537; Daniels v. Benedict, 50 *Id.* 353; Baulton v. Scott, 2 Green's Ch. 231; Tomkins v. Tomkins, 3 Stockt. 512; Dringer v. Jewett, 42 N. J. Eq. 577; Doughty v. Doughty, 27 *Id.* 318; Embry p. Palmer, 107 U. S. 3; Phillips v. Negley, 117 *Id.* 675; Bank of Ky. v. Hancock's Ad., 6 Dana, 284; Bigelow on Est., 189; Free. on Judg., Sec. 435. In Amory v. Amory the judges disagreed. Judge Drummond's opinion is published in 12 Law Reg. 585, and Judge Miller's in 3 Biss. 266.

the court in Christmas v. Russel,[42] it was clearly the intention only to hold that in the United State courts actions upon judgments of State courts could not be defended against upon the ground of fraud. The right, however, to enjoin their enforcement by a direct proceeding in equity, was distinctly recognized.[43] The same may be said of Maxwell v. Stewart,[44] Nogue v. Clapp,[45] and Graham v. Boston, etc. R. R.,[46] which are explained and distinguished in Marshall v. Holmes,[47] and held not to be in conflict with the latter case. In Simmons v. Saul,[48] although, in the opinion former decisions of that court are misunderstood and misapplied, all that it was necessary to decide, and probably all that the court intended to decide, was that the courts of the United States have no jurisdiction of the administration of the estates of deceased persons. This was in accordance with rulings in other cases.[49] Altogether, it would seem that the right to set aside, annul, or enjoin the judgments of other courts has been much enlarged in later years, and that many of the earlier decisions, and some modern ones, have either been tacitly overruled or so distinguished and modified that they can no longer be safely relied upon as authority.

Carson, Nev. R. R. BIGELOW.

[42] 5 Wall. 290.

[43] See Marx v. Fore, 51 Mo. 69, 76, 77; Ward v. Quinliven, 57 *Id.* 425, 427.

[44] 22 Wall. 77. This point was not involved in Riggs v. Johnson Co., 6 Wall. 166, and some of the language used there is also a little too broad. The same remark applies to Hanley v. Donoghue, 116 U. S. 1.

[45] 101 U. S. 551.

[46] 118 U. S. 161.

[47] 141 U. S. 589, 600.

[48] 138 U. S. 589, 600.

[49] Touvergne v. New Orleans, 18 How. 470; *In re* Broderick's Will, 21 Wall. 503; Ellis v. Duncan, 109 U. S. 485.

PARTIES ANSWERABLE OVER—ESTOPPEL—JUDGMENT—EVIDENCE—BILL OF EXCEPTIONS.

CITY OF ST. JOSEPH V. UNION RAILWAY CO.

Supreme Court of Missouri, June, 1893.

1. *Parties Answerable over—Estoppel.*—Where judgment was rendered against the city in favor of one injured by a defective street, the party creating such defect is liable over to the city for the judgment recovered against it, and if such party had notice of the litigation, and was given an opportunity to control its proceedings, such judgment is conclusive against him as to the right of the injured party to recover and as to the amount which the city would be entitled to recover. But such party might show that he was not in fault or that the accident was caused by the negligent conduct of both parties in which event no recovery could be had.

2. *Judgment as Evidence—Burden of Proof.*—The former record and judgment may be read in evidence to show that there had been a recovery against the city, and the amount it was compelled to pay, but it does not make out a *prima facie* case. The city must show that party was in fault, and that the injury was occasioned thereby.

3. *Bill of Exceptions, Evidence Preserved Therein*—The evidence given on the former trial, and preserved in a bill of exceptions, is not admissible when the witnesses are present in court.

BLACK, J., delivered the opinion of the court:

William Tippin recovered judgment against the city of St. Joseph for $6,000, compensation for personal injuries which he sustained by reason of a defective street. The judgment was affirmed on appeal to this court, and thereafter the city paid the judgment, and then brought this suit against the defendant, a street car company, to recover the amount so paid to Tippin, and the costs and expenses of that suit. Tippin alleged in his position that Sixth street, at a designated place, was unsafe and dangerous in this, to-wit: "The same was rough and uneven, and there existed in the same excavations, gullies and holes; and in and along said street, and near the center of the traveled portion of said street there was at said time a horse railroad track, the top of the rails of which were more than four inches above the surface of the street, all of which rendered said street defective, unsafe and dangerous. . . That while plaintiff (Tippin) was riding along said Sixth street in a two horse-wagon, his team became frightened and ran away and up and along said street, and ran into and against and upon said holes, excavations and gullies and uneven places in said street, and on and against said railroad track, and was then and there and on account thereof thrown out of said wagon" and injured, etc. The instructions given in that case made the city liable if there were holes and gullies in the street, and the rails of the street car track were several inches above the surface of the street, rendering it unsafe for travel. The jury were also told that, although the city did not place the street car rails on the street, still if they were there and were higher than the rest of the street so as to make the street unsafe and unfit for use, the city was liable for injuries resulting from such defects. On the trial of this case, the city introduced evidence tending to show notice to the defendant of the institution of the former suit and that defendant took part in the trial of that case. The city put in evidence the pleadings, verdict, judgment and bill of exceptions in the former suit; also the following ordinance:

"The said company shall construct its track of flat iron rail from their present terminus on Market Square to the southern limits of the city as near as may be to the center and even with the

grade of the street on which it may be laid so that the flow of water in lateral and cross gutters is not obstructed thereby, and the space between the rails shall be kept in good repair by said company so as not to obstruct passing and crossing or traveling on said streets by other vehicles."

The city rested its case on the foregoing evidence, and the defendant moved for a nonsuit, which motion was overruled. The defendant then offered to prove that its tracks were laid, kept and maintained in compliance with the ordinance, but the court excluded the evidence. The court thereupon directed the jury to find for the plaintiff. According to the ordinance read in evidence it was the duty of the street car company to lay its track rails even with the grade of the street, and to keep the space between the rails in good repair. If Tippin was injured by the failure of the street car company to perform these duties or either of them, then it is liable over to the city for the damages sustained by Tippin. This proposition is not denied by the defendant. It was said in Strong v. Ins. Co., 62 Mo. 289, that where one is bound to protect another from liability he is bound by the result of a litigation to which such other is a party, provided he had notice of the litigation and an opportunity to control the proceedings. And the rule was reasserted in Garrison v. The Baggage Trans. Co., 94 Mo. 130. The same principle of law is thus stated in Littleton v. Richardson, 34 N. H. 187: "Where a person is responsible over to another, either by operation of law or by express contract, and he is duly notified of the pendency of the suit, and requested to take upon him the defense of it, he is no longer regarded as a stranger, because he has the right to appear and defend the action, and has the same means and advantages of controverting the claim as if he was the real and nominal party upon the record. In every such case, if due notice is given to such person, the judgment, if obtained without fraud or collusion, will be conclusive against him, whether he appeared or not." This statement of the rule was approved in City of Boston v. Worthington *et al.* 10 Gray, 496. Indeed the rule is too well settled to call for further citation of authorities. But the judgment in the prior suit is not conclusive evidence of all matters necessary to be proved by the plaintiff in his suit against the indemnitor. Thus the question whether the relation exists which gives a remedy over is, of course, open to inquiry. Again the judgment in the first suit is conclusive only as to the facts thereby established; for the scope of the estoppel created by the first judgment cannot be extended beyond the points, and issues necessarily determined by it. 2 Black on Judgments, Sec. 574. Now looking to the pleadings and the instructions given in the suit of Tippin against the city, we see the jury must have found that there were holes and gullies in the street and that the street car rails were higher than the surface of the street. The street car company having been notified of the commencement of that suit, and afforded an opportunity to defend, the judgment therein is conclusive in this suit as to the following matters: First, that the street was in an unsafe and dangerous condition because there were holes and gullies in it, and the street car rails were several inches above the surface of the street; second, that Tippin was injured by reason or such defective condition of the street without fault on his part; and third, that he sustained damages to the amount of $6,000. But all this does not show a breach of duty on the part of the street car company. The unsafe condition of the street may have been due entirely to the negligence of the city in failing to keep the street surface in proper condition. It does not appear from the facts found in the first suit that the company failed to lay its track rails even with the grade of the street, or failed to keep the space between the rails in good repair. These are here questions material in the present suit, but not litigated in the first suit. To the success of Tippin's suit it was not material to show that the street car company was in fault. It was enough to show a street in an unsafe condition. Whether the company was negligent in the performance of any duty devolved upon it by the ordinance was not an issue in the first case. The questions, therefore, whether the street car company made breach of any duty devolved upon it by the ordinance, and if it did, whether that breach caused the injury are questions open to the injury in this cases. The City of Boston v. Worthington *et al.*, 10 Gray, 496; Littleton v. Richardson *et al.*, *supra*, S. C., 66 Am. Dec. 759; Catterlin v. The City of Frankfort, 79 Ind. 547; 2 Black on Judgments, Secs. 574-5.

Applying these principles of law, it follows that the trial court rightly admitted in evidence the pleadings, verdict and judgment in the first case. But the court erred in excluding the evidence offered by the defendant; and it erred in giving a peremptory instruction to find for the plaintiff. The court allowed the city to read in evidence the testimony of the witnesses given on the trial of the first case, as preserved in the bill of exceptions, and in this it also erred. No doubt but parol evidence may be often resorted to for the purpose of showing the identity of the matter litigated, where the record is silent on the subject, and the evidence found in the bill of exceptions may be used for that purpose. Such evidence often becomes competent to explain the judgment where there are a number of issues, the finding upon any one of which would support the judgment. 46 Mo. 26; 51 Mo. 51; 58 Mo. 61. But the principle can have no application here; for the petition and the instructions given show precisely upon what ground the jury found for the plaintiff. The facts found are that there were holes and gutters in the street, and the car track rails were several inches above the surface of the street. This was the theory of fact, and the only theory of fact upon which the case was submitted to the jury. All this is shown by the pleadings

and the instructions given, and there was no occasion for resorting to further evidence to show what was litigated in the first suit. In view of a new trial it may be added that the burden of proof is upon the city to show that the street car company was in fault because of a failure to comply with the ordinance, and the record in the first suit does not make out a *prima facie* case for the city on this issue. The judgment is reversed and the cause remanded. The other judges concur. Barclay, J., expressing no opinion on that point, wherein it is held by the foregoing opinion that the court erred in permitting the plaintiff to read in evidence on the trial of this case, the evidence contained in the bill of exceptions filed in the first case.

NOTE.—*Parties Answerable Over.* 1. The duty of one person to protect another from liability may arise by operation of law or by contract, as if a person by his act or fault should create a nuisance in a street which a city is bound to keep in repair, and thereby cause an injury to another, the city would be liable for the damages, but it would have a remedy over against the party whose fault created the nuisance. Western, etc. R. Co. v. Atlanta, 74 Ga. 774; Boston v. Worthington, 10 Gray, 500.

So, if a deputy commit a tort for which his principal is bound, there would be a joint liability to the party injured, but if the principal be sued, and mulcted in damages, he may recover over against the deputy. Elliott v. Hayden, 104 Mass. 180; Hand v. Taylor, 4 Ind. 416; Verplank v. Van Buren, 76 N. Y. 247. So, when a carrier has been compelled to pay for goods lost by the fault of a connecting carrier a recovery over may be had for the damages received by the first action. Garrison v. The Baggage Trans. Co., 94 Mo. 130; Hagerthy v. Bradford, 9 Ala. 567; Bone v. Torry, 16 Ark. 83; Brown v. Chaney, 1 Sneed (Tenn.), 286; Chicago, etc. R. Co. v. Northern Line Packet Co., 70 Ill. 217. And where judgment has been recovered against the original insurer, he may recover over against a re-insurer. Hastee v. De Peyster, 3 Caines, 190; Strong *et al.* v. The Phœnix Ins Co , 62 Mo. 289. There may be many other cases in which the one person may have an action over against one whose fault or undertaking affords him such a remedy.

2. In all cases in which one person is bound to protect another from liability, he is bound by the result of a litigation to which such other is a party, provided he had notice and an appointment to control the proceedings. Boston v. Worthington, 10 Gray (Mass.), 498; Strong v. Ins. Co., 62 Mo. 289; Garrison v. The Baggage Trans. Co., 94 Mo. 130; Littleton v. Richardson, 34 N. H. 187; Port Jervis v. First Nat. Bank, 96 N. Y. 550; Western, etc. R. Co. v. Atlanta, 74 Ga. 774; Chicago v. Robbins, 2 Black (U. S.), 424. In Robbins case, *supra*, it was held that an express notice was not necessary, but if he knew that a suit was pending against the city for an injury caused by his fault, and could have defended it, he was liable and concluded by the judgment in the prior action. But we think in such case, in order that the judgment should operate as an estoppel upon him, he should not only have knowledge of the pending litigation, but should be offered an opportunity to control the case, and the circumstances should be such that when he had exonerated himself from fault no recovery could be had for the injury complained of; for if both were at fault and by their wrong-doing contributed to the cause which produced the injury there would be no liability over, and the supposed indemnitor would not be bound to defend, nor would he be estopped by the result of the litigation. Western, etc. R. Co. v. Atlanta, 74 Ga. 774; Boston v. Worthington, 10 Gray, 500.

3. In an action to recover over the judgment in the former action, if notice was given and the party required to defend, will be conclusive against him: 1. That the wrong was perpetrated or right of action existed as charged in the petition upon which the recovery was had. 2. That the plaintiff in the former suit was injured as alleged, and had a right to recover; 3. As to the amount of damages assessed. But this does not entitle the plaintiff to recover. He must also establish: 1. The contract relation or relation between him and the indemnitor which gives a remedy over, for this is open to inquiry. 2. An action for the cause for which the defendant is liable. 3. Notice to the defendant, and that he was given in opportunity to defend the former action.

4. In general, when one party has been compelled to pay damages in consequence of the negligence or wrongful act of another, he may, if he did not by his own fault contribute to or assist in causing the injury for which the recovery was had, recover over against the party in fault, and if due notice was given to him, and an opportunity to take charge of the defense, the judgment, if obtained without fraud or collusion, will be conclusive against him in the particulars above mentioned. Milford v. Holbrook, 9 Allen, 17; Woods v. Groton, 111 Mass. 357; Woburn v. Henshaw, 101 Mass. 193; Prichard v. Farrar, 116 Mass. 213; Boston v. Worthington, 10 Gray (Mass), 500; Davis v. Smith, 79 Me. 351; Hardy v. Nelson, 27 Me. 530; Littleton v. Richards, 34 N. H. 187; Brooklyn v. R. R. Co., 47 N. Y. 475; City of Rochester v. Montgomery, 72 N. Y. 65; Catterlin v. Frankfort, 79 Ind. 547; McNaughton v. City of Elkhart, 85 Ind. 384; City of Elkhart v. Wickwire, 87 Ind. 77; Chicago v. Robbins, 2 Black (U. S.), 418; Chicago, etc. R. Co. v. Northern Line Packet Co., 70 Ill. 217; Western, etc. R. Co. v. Atlanta, 74 Ga. 774; Port Jervis v. First Nat. Bank, 96 N. Y. 550; Stone v. Ins. Co., 62 Mo. 289; Garrison v. Baggage Trans. Co., 94 Mo. 130; Russell v. Place, 94 U. S. (4 Otto) 606.

5. *Whether Testimony may be Read from a Bill of Exceptions.*—The bill of exceptions, signed, sealed and made a part of the record, is the best of evidence of what the witness swore to on the trial, and may be used when the witness is dead. Corby v. Wright, 9 M. A., p. 5. And the evidence of a witness taken at the former trial, when there is a proper showing of diligence and it is impossible to have the living witness, and without any fault of the party his deposition has not been taken, his testimony may be read from the bill of exceptions; but where he might have been had or his testimony taken by deposition with proper diligence, such record of his testimony cannot be used, although shown to be correct. Franklin v. Zimmerman, 11 M. A., p. 306; Clinton v. Eites, 20 Ark., pp. 216, 235; Augusta Wine Co. v. Weipport, 14 M. A., 483; Shearer v. Harper, 36 Ind., pp. 536, 541; 1 Greenl. Ev. § 163; Morris v. Hammerle, 40 Mo., p. 489. Jackard v. Anderson, 37 Mo., p. 91.

Evidence given in former proceedings by a witness may be used in a subsequent proceeding, or in a later stage of the same proceeding, when the witness is dead, or is mad, or sick, or kept out of the way by the adverse party, or is out of the jurisdiction of the court (in civil cases), provided in all cases: 1. That the person against whom the evidence is to be given had the right and opportunity to cross-examine the declarant when he was examined as a witness. 2

That the questions in issue were substantially the same in the first as in the second proceeding. 3. That the proceeding, if civil, was between the same parties or their representatives in interest. 4. That, in criminal cases, the same person is accused upon the same facts. 7 Am. and Eng. Ency. Law, p. 75. But when the witness is present at the trial, it is error to admit his testimony to be read from the bill of exceptions, although he testified in the same cause between the same parties, and was cross-examined.

By the Session Act of 1891, p. 138, of Missouri, the testimony of a witness contained in a bill of exceptions in a cause, may be used in the same manner, and with like effect as if it had been preserved in a deposition, but the opposite party may prove any matters contradictory thereof, as though such witness were present testifying in person.

St. Joseph, Mo. H. S. KELLEY.

CORRESPONDENCE.

CONSTITUTIONALITY OF "SINGLE TAX" LAW.

To the Editor of the Central Law Journal:

As one of your readers, I find myself especially interested in an editorial paragraph in the issue of the 23d instance, commenting upon the Maryland "Single-Tax" case of Wells v. The Commissioners of Hyattsville. The doctrine denounced by the court of appeals was the "Single-Tax," as taught by Henry George, and not a "local vagary, having its origin in the fertile brain of the Hyattsville Commissioners." It was the fortune of the writer to draw the act declared unconstitutional, as well as to be president of the board of commissioners which maintain the single tax for one year, and, perhaps, may, therefore, be permitted to say a word. The thing done by the board was simply to exempt personal property and improvements from taxation and to levy taxes on land values only. It was sought by *mandamus* to compel the restoration of the omitted property to the assessment rolls. This the court refused, the application having been informal in certain respects and brought too late. At the same time the court of appeals denounced the single tax as an economic heresy, and declared the provision of the Hyattsville charter relative to taxation] to be unconstitutional. The action of the court thus resembled that of another judicial body which in times past was said to have given "the law to the North and the nigger to the South." In view of the facts stated, the court will be at perfect liberty at some future date if it so chooses, to repudiate as *obiter dicta* its own expressions, both as to the law (of which it is the judge), and as to economics, about which laymen and lawyers can form equally intelligent opinions. J. H. RALSTON.

Washington, D. C., June 25, 1893.

STIPULATIONS LIMITING LIABILITY OF TELEGRAPH COMPANY IN NEBRASKA.

To the Editor of the Central Law Journal:

In the valuable article of Percy Edwards, in the JOURNAL of June 16th, in regard to stipulations in telegraph blanks limiting the liability of the company, the case of Becker v. West. Union Tel. Co., 11 Neb. 87, is cited in support of the proposition. It should be known, however, that after the decision in that case the legislature passed an act which in effect declares such stipulations invalid. The case of West. Union Tel. Co. v. Lowrey, 32 Neb. 732, arose under the statute, and it was sustained and the company held liable.

A QUESTION OF MARITIME LIEN.

To the Editor of The Central Law Journal:

A company is engaged in the business of running a steamboat and barges, on the Mississippi river, for the sole purpose of exhibiting shows, combinations of trained animals, clowns as in circuses, etc., it being shown, that a firm furnished printing in show bills and other advertising cards and prints, which were necessary for the success of the business. Does said firm have a maritime lien, which could be enforced in a proceeding "In rem" as intervenors in a libel proceeding? Let it be understood that the boats were simply for the show business, and not carriers of freight or passengers. X. Y.

PERPLEXING BIRTH NOTICE.

To the Editor of the Central Law Journal:

I take an exception to your ruling in favor of "Humor of the Law" in the birth notice culled from the *Irish Law Times*, and noticed in your last issue under the above heading "Humor of the Law." Now let's see who is "looking through a glass darkly." You print the notice *verbatim et literatim, et punctuatim* as follows: "At Limerick, the wife of W. F——, Solicitor, of a son, who only survived his birth by a few minutes." The phraseology of such notices in the English and Irish papers is a little different from the phraseology of these same notices in American papers. So with this notice. But, so far as correct diction and grammatical construction is concerned, it is not open to humorous reflection. Let us look at the construction: "At Limerick, the wife of W. F——, Solicitor, that is W. F., the husband, is the "solicitor," "of a son," meaning that the wife of W. F. was delivered "of a son," "who only survived his birth a few minutes," "who" showing the proper relation of the "son" and the death which followed in "a few minutes." This notice appears of course under the proper heading and is properly punctuated the way it stands, and is correct. Now, I submit, Mr. Editor, you should not look to such a grave source for your "Humors of the Law." It is up nearer the surface.

PERCY EDWARDS.

BOOK REVIEWS.

BOLLES ON BANK COLLECTIONS.

The author of this work is known as an authority on the subject of the law pertaining to banks and banking. Various treatises on topics of that character have come from his pen and been well received by the profession, and also adopted as guides to the practica banker. The present volume treats solely of collections by banks and the various perplexing questions as to ownership, indorsement of paper, presentment and demand, payment, etc. The book has over three hundred pages, has a liberal citation of authorities in foot notes and has a good index. The text seems to be carefully prepared and well written. If we were disposed to criticise we should find occasion for it in the heavy paper and poor binding. The work deserves a first class sheep binding instead of the cloth in which it appears. It is published by the Homans Publishing Co., New York.

AMERICAN STATE REPORTS VOL. 29.

The present volume is fully up to the high standard with which this series of reports was begun and has been maintained. Among the many valuable cases we find Falls v. Wright (Ark.), with an exhaustive note on the subject of judgments void because the court exceeded its jurisdiction; Plume v. Atwood Manuf. Co. v. Caldwell (Ill.), on the subject of conflicts of jurisdiction of courts; Commonwealth v. Sapp, on privileged communications between husband and wife, and Watson v. Tromble (Neb.), on the effect and conclusiveness of order confirming a judicial sale.

BOOKS RECEIVED.

A Treatise on Equity Jurisprudence with particular reference to the conditions of Jurisprudence in the United States by Christopher G. Tiedman Author of "Real Property," "Police Power," "Sales of Personal Property," etc., and Professor of Law of the University of the City of New York, St. Louis, The F. H. Thomas Law Book Co., 1893.

A Treatise on the Law Relating to Gifts and Advancements by W. W. Thornton of the Indianapolis Bar, Author of "Railroad Fences and Private Crossings" "Lost Wills," etc. Philadelphia T. & J. W. Johnson & Co. 1893.

Studies in History, Economics and Public Law Edited by The University Faculty of Political Science of Columbia College Volume III (Number 1.) History of Elections in The American Colonies. By Cortland F. Bishop, Ph. D. Columbia College, New York, 1893.

American Railroad and Corporation Reports. Being a Collection of the Current Decisions of the Courts of Last Resort in the United States Pertaining to the Law of Railroads, Private and Municipal Corporations including the Law of Insurance Banking, Carriers, Telegraph and Telephone Companies, Building and Loan Associations, etc. Edited and Annotated by John Lewis, Author of "a Treatise on Eminent Domain in the United States." Volume VI. Chicago, E. B. Myers & Company, Law Publishers, 1893.

HUMORS OF THE LAW.

Lawyer (to kicking client)—"Well, have you at last decided to take my advice and pay this bill of mine?"

Client—"Yes."

Lawyer—Very well; (to clerk) John, add $5 to Mr. Smith's bill, for further advice."

An amusing incident occurred in a Chicago Justice court the other day. The defendant's attorney in a civil suit, after assiduous endeavors to obtain a continuance in the cause, said to the court, "Your Honor, my client says he cannot get a partial trial in this court and takes a change of venue to Justice———."

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

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1. ACTION—Venue—Residence of Defendant.—Under Code, art. 75, § 132, providing that any person who resides in a county, but carries on a regular business or habitually engages in any avocation or employment in another county, may be sued in either county, a person residing in a county outside of the city of Baltimore, but carrying on a regular business therein, may be sued in such city, without regard to the place of his "principal business."—CHAPPELL V. LACEY, Md., 26 Atl. Rep. 499.

2. ADMINISTRATION—Sale of Decedent's Land.—Code, § 2111, which requires an applicant for the sale of decedent's land to prove the insufficiency of the personal property to pay the debts by the deposition of "witnesses," does not render void a sale because the necessity therefor was proved by only one witness, since Code, § 1, provides that the "singular includes the plural, and the plural the singular," with reference to words used in the Code.—THOMPSON V. BOSWELL, Ala., 12 South. Rep. 809.

3. ADMINISTRATION—Settlement and Accounting.—An administrator cannot bind the minor heirs oy an agreement to pay a debtor of the estate one-third of his debt if he will accept service, so that judgment can be obtained against him in advance of other creditors, and, on making such payment, he is not entitled to credit therefor in his settlement. — EDWARDS V. WILLIAMS, S. Car., 17 S. E. Rep. 457.

4. ADMINISTRATION — Settlement of Estate.—Where the time fixed by the probate court for the presentation of claims against an estate has not expired, no action can be maintained by the creditor on the bond of the residuary legatee and sole executor, given by him, under How. St. § 5836, on taking possession of the estate, since such executor and residuary legatee can be charged only with such claims as are proved and allowed in the probate court. — BLACKMORE V. KENT PROBATE JUDGE, Mich., 54 N. W. Rep. 945.

5. APPEAL — Appealable Judgments — Parties.—The sureties upon a *supersedeas* bond, after affirmance by the appellate court, cannot have the judgment thereafter entered against them in the trial court reviewed on writ of error without joining the principal and all other defendants in the writ, or obtaining a severance or other equivalent proceedings giving them the right to proceed alone.—HUMES V. THIRD NAT. BANK, U. S. C. C. of App., 54 Fed. Rep. 917.

6. ASSIGNMENT FOR BENEFIT OF CREDITORS.—Though a receiver is guilty of a breach of trust in permitting a firm of which he is a member to mingle receivership money with its own, in violation of an order of court requiring him to loan the money on real estate security, and though such firm is chargeable with knowledge of the breach of the trust, yet, where the money is not traceable into any specific property of the firm, no lien attaches to any of the firm property in favor of the receiver or of the beneficiaries of the trust as against other creditors of the firm; and the firm cannot prefer the receiver in making an assignment for the benefit of creditors, though it may have

agreed to give him a mortgage when the loan was made.—GOLDTHWAITE v. ELLISON, Ala., 12 South. Rep. 812.

7. ASSIGNMENT FOR BENEFIT OF CREDITORS—Action to Set Aside. — Where one creditor alone sues to set aside an assignment for the benefit of creditors and subject the property to the satisfaction of his judgment, it is error, on setting the assignment aside, to decree distribution *pro rata* between plaintiff and other creditors, the latter of whom are not parties to the suit, since, as they would not be bound by a judgment against them, they cannot have the benefit of a judgment in their favor. — RYTTENBERG v. KEELS, S. Car., 17 S. E. Rep. 441.

8. ASSIGNMENT FOR BENEEIT OF CREDITORS — Construction.—Where a deed of assignment for the benefit of creditors, without describing it, purports to convey all the property of the insolvent, "except such property as is exempt by law from levy and sale under execution," and to it is attached a schedule, which describes her business homestead, such schedule, while it cannot be made to convey property exempted from the operation of the deed, may be looked to in ascertaining what she understood to be exempt property.—TACKABERRY v. CITY NAT. BANK, Tex., 22 S. W. Rep. 151.

9. ASSIGNMENT FOR BENEFIT OF CREDITORS—Deed.—Where a married woman, having both a business and residence homestead, makes a deed of assignment, as an insolvent debtor, of her property, except such as is exempt from forced sale, and her schedule, after a recital that "this is the property assigned," describes her business homestead, the papers, construed together, amount to the declaration of an intention to convey the business homestead for the benefit of her creditors.—TACKABERRY v. CITY NAT. BANK, Tex., 22 S. W. Rep. 122.

10. ASSOCIATION—Expulsion of Member.—A resolution by the National League of Musicians prohibiting any band composed wholly or in part of members of any local body of the league from participating in any procession, tournament, or public entertainment in which any government band should take part, outside of their government duty: Held, that a member of a local body who disobeyed such resolution was guilty, at most, of a violation of a by-law of the local body prohibiting members from assisting at any musical performance with any professional musician not a member in good standing of the local body, under the penalty of a fine of $5 for the first offense, $10 for the second, and expulsion for the third; and that the imposition of a $25 fine by the local body was void.—MEURER v. DETROIT MUSICIANS' BENEVOLENT & PROTECTIVE ASS'N, Mich., 54 N. W. Rep. 954.

11. ATTACHMENT — Contingent Remainders.—A contingent remainder is not within Code 1873, ch. 148, § 1, allowing an attachment against "estates or debts" in certain instances.—YOUNG v. YOUNG, Va., 17 S. E. Rep. 470.

12. BANK—Savings Bank—Interest on Demand Note.—Where a savings bank accepts interest in advance on a note payable on demand, it is *prima facie* evidence of an agreement to forbear collecting the note until the expiration of the time for which such interest is paid, and the maker cannot, on payment of the principal before the expiration of such time, recover back the unearned interest, in the absence of an agreement by the bank to repay it.—SHELLY v. BRISTOL SAV. BANK, Conn., 26 Atl. Rep. 474.

13. BILL OF SALE—Property not Included.—The owner of a mill executed a bill of sale to a bank on a large quantity of flour, feed, and other property in the mill. Prior to the execution of the bill of sale, the mill owner had ordered several cars of wheat from a warehouseman in another county, and one car so ordered was shipped one day after the execution of the bill of sale, and two days thereafter received at the mill, and a portion, or all, ground into flour, and mixed with the stock in the mill: Held, that in no event did the bill of sale cover that wheat, and the person who claimed to be the owner of the mill was liable for the value of the wheat:—FIRST NAT. BANK OF DENVER v. SCOTT, Neb., 54 N. W. Rep. 987.

14. CARRIERS—Passenger—Negligence.—It is the settled rule in this State that where different minds may draw different inferences from the same state of facts, as to whether such facts establish negligence, it is a proper question for the jury, and not for the court; but that rule is subject to the qualification that the inference of negligence must be a reasonable one, where it is impossible to infer negligence from the established facts without reasoning irrationally, and contrary to common sense, and the experience of average men, it is not a question for the jury, and the court should direct a verdict for the defendant.—CHICAGO, B. & Q. R. CO. v. LANDAUER, Neb., 54 N. W. Rep. 976.

15. CEMETERIES—Right to Condemn Lands.—Under Gen. St. § 1871, providing that the owner of any cemetery, who wishes to enlarge its limits by adding land, "the title to which he cannot otherwise acquire," may prefer a complaint for liberty to take the same, a cemetry association, after a fair attempt, and failure, to agree with the owner of land desired by it for cemetery purposes, may maintain condemnation proceedings to acquire the same. — WESTFIELD CEMETERY ASS'N v. DANIELSON, Conn., 26 Atl. Rep. 345.

16. CHATTEL MORTGAGES — Possession.—Where, in a chattel mortgage, the mortgagor agrees that upon default the mortgagee may take possession of the mortgaged property either preliminary to foreclosure or for preservation, the right of the mortgagee to take possession is not defeated by the death of the mortgagor.—PURDIN v. ARCHER, S. Dak., 54 N. W. Rep. 1043.

17. CONSTITUTIONAL LAW—View by Jury.—Code 1892, § 2391, relating to a view by the jury, is unconstitutional, so far as it relates to a view, in criminal cases, of the place in which the offense is charged to have been committed," since an accused must be confronted, in the presence of the court, by all the witnesses against him, and the jury could, out of the presence "of the court, and in the absence of the accused, form opinions from the evidence of inanimate witnesses.—FOSTER v. STATE, Miss., 12 South. Rep. 822.

18. CONTRACT—Work and Labor.—A party who has contracted to perform work for another may, on breach of the contract by the other party thereto, recover for work done on a *quantum meruit;* and the measure of damages is not necessarily the contract price, but he may recover their reasonable value, though such value is in excess of the rate fixed by the contract.—HEMMINGER v. WESTERN ASSUR. CO., Mich., 54 N. W. Rep. 949.

19. CONTRACTS—Part Performance.—Where the contract required plaintiffs to tow a certain quantity of logs for defendants, and they only towed a portion of the logs, such part performance cannot serve as the basis of a recovery for what they did under the contract.—BOUTIN v. LINDSLEY, Wis., 54 N. W. Rep. 1017.

20. CORPORATIONS — Stockholders' Books.—A stockholder has the legal right to inspect the books of the corporation of which he is a member.—LEGENDRE v. NEW ORLEANS BREWING ASS'N, La., 12 South. Rep. 837.

21. COUNTY COMMISSIONERS — Defective Bridges.—A complaint in an action against a board of county commissioners for personal injuries is sufficient where it states that defendant erected a bridge over a running stream, "on the line and as a part of a public highway," and that plaintiff was injured by its failure to place a guard rail at the side of the approach, since Rev. St. 1881, §§ 2882, 2892, impose the duty on the commissioners to keep such bridges in repair.—BOARD OF COM'RS v. CASTETTER, Ind., 33 N. E. Rep. 986.

22. COURTS—Jurisdictional Amount. — The jurisdiction of the court cannot be defeated when the case stated in the petition is within it, unless the allegations on which the jurisdiction depends were fraudulently inserted for the purpose of conferring such ju-

risdiction; and when defendant proposes to introduce evidence of such facts he must plead them.—HOFFMAN V. CLEBURNE BLDG. & LOAN ASS'N, Tex., 22 S. W. Rep. 154.

23. CRIMINAL LAW—Carrying Weapons.—Pen. Code, art. 319, declaring that the prohibition against carrying arms does not extend to a revenue or other civil officer engaged in the discharge of official duty, authorizes a deputy postmaster to carry a pistol only while he is actually engaged in the post-office.—LOVE V. STATE, Tex., 22 S. W. Rep. 140.

24. CRIMINAL LAW — Misdemeanors — Confession of Judgment.—Code, §§ 4502, 4504, which permit one accused of misdemeanor to confess judgment, with good and sufficient sureties, for the "fine and costs," mean all costs, including officers' fees, incurred in behalf of the State, but do not include any costs incurred by defendant in making his defense.—BOWEN V. STATE, Ala., 12 South. Rep. 808.

25. CRIMINAL LAW—Murder — Instructions.—On the trial for murder, where the evidence showed that, while deceased and another were quarreling in a room at the rear of the saloon, defendant, the barkeeper, entered the room, and, without any adequate cause for passion, shot deceased, and the court charged on the law of murder in both degrees, and of justifiable homicide in the protection of the person of another, there was no error in refusing to give a charge of the law of manslaughter.—MEALER V. STATE, Tex., 32 S. W. Rep. 142.

26. CRIMINAL LAW — Theft.—Where a person steals property and sells it, and afterwards, and to prevent a detection of his theft and a repayment of its value by himself to the rightful owner, destroys such property, without the knowledge or consent of the person to whom he sold it, such act constitutes a theft.—STEGALL V. STATE, Tex., 22 S. W. Rep. 146.

27. CRIMINAL LAW—Witness.—The statute declaring that no reference shall be made to the failure of a defendant in a criminal case to testify does not apply to other witnesses, and it is not error for the district attorney to comment on defendant's failure to put his wife on the stand.—HALL V. STATE, Tex., 22 S. W. Rep. 141.

28. CRIMINAL PRACTICE—Defective Indictment.—The failure of an indictment to allege that it was presented in court is a defect of form only, and is not a ground for arresting a judgment.—JONES V. STATE, Tex., 22 S. W. Rep. 149.

29. CRIMINAL PRACTICE—Indictment—Presentment.—Where the record shows that a grand jury was organized for a term of the circuit court, and that during the term said grand jury presented against an accused an indictment properly signed and indorsed as required by statute, and marked "Filed in open court" by the clerk, this is sufficient to show that said indictment was properly returned into court.—WESCOTT V. STATE, Fla., 12 South. Rep. 846.

30. CRIMINAL PRACTICE — Recognizance.—A recognizance on appeal in a criminal case, which recites the offense in the alternative instead of conjunctively, and describes the court to which the appeal is taken as the "court of appeals" instead of the court of "criminal appeals," is fatally defective.—GARZA V. STATE, Tex., 22 S. W. Rep. 139.

31. CRIMINAL TRIAL—Amendment of Verdict.—Where, an information alleging that defendant did feloniously and of his malice aforethought kill and murder W, the jury find defendant guilty as charged in the information, and are discharged, the verdict cannot be afterwards corrected by the court, or by reassembling the jury and ascertaining from them what degree of murder they intended to find.—ALLEN V. STATE, Wis., 54 N. W. Rep. 999.

32. DEED—Condition Subsequent.—A provision in a deed for land within a city to be used as a cemetery that "the grantee, his successors and assigns, shall at all times maintain a good and sufficient fence around the premises," should be construed as a covenant, and not as creating a condition subsequent, where it is evident that the grantor, who owned lands on both sides, sought to impose a duty on the grantee to build all the fence inclosing the cemetery.—SCOVILL V. MCMAHON, Conn., 26 Atl. Rep. 479.

33. DEED—Validity.—Though under Code, 1880, § 993, dispensing with the use of private seals, except as to corporations, and abolishing all distinctions between sealed and unsealed instruments made by private persons, either as to the rights conferred by them, or the remedies on them, the distinction previously existing in reference to remedies which rested on the existence of deeds is abolished, such statute does not give a different effect to instruments previously executed than they had at the time of the execution; and where the title of plaintiff in ejectment is based on an unsealed deed, executed prior to the passage of such statute, such action must fail.—GIBBS V. MCGUIRE, Miss., 12 South. Rep. 829.

34. DEED OF TRUST—Bidder.—In a proceeding by the obligee of bonds against the obligor, and the trustee of a trust deed given to secure the same, to have an account of liens taken and for a sale of the land, a bidder at commissioners' sale who fails and refuses to comply with the terms of sale stated in the order of directing the same, after the land is cried off to her, is not a purchaser in such legal sense as to make her a party to the proceeding, and entitle her to prosecute an appeal from a decree therein confirming a subsequent sale to other bidders.—HILDRETH V. TURNER, Va., 17 S. E. Rep. 471.

35. DEED—Quitclaim—Bona Fide Purchaser.—A remote grantee of a trustee holding the legal title to land is not affected by the trust as a *bona fide* purchaser because some of the mesne conveyances through which he deraigns title are mere releases or quitclaims, except that they contain the usual *habendum* clauses.—FINCH V. TRENT, Tex., 22 S. W. Rep. 132.

36. EJECTMENT — Tax Sales. — Where defendant in ejectment pleads title in himself under a tax deed, plaintiff may, without having pleaded them, show any facts affecting the validity of the tax deed, or which would render it unavailable to defendant.—GOULD V. SULLIVAN, Wis., 54 N. W. Rep. 1013.

37. EQUITABLE LIEN — Agreement to Execute Mortgage.—An agreement, for a valuable consideration, to execute a chattel mortgage on a wheat crop, will be treated in equity as a mortgage, since equity regards that as done which the parties themselves have agreed to be done; and the equitable lien created thereby is valid against a general assignee for the benefit of mortgagor's creditors, since such assignees are not *bona fide* purchasers for a valuable consideration.—G. OBER & SONS CO. V. KEATING, Md., 26 Atl. Rep. 502.

38. EQUITY—Appeal—Decree.—A decree, rendered at the suit of a stockholder, removing the liquidators of a corporation because they had interests adverse thereto, and appointing receivers having the powers and duties of liquidators in addition to the usual functions of receivers, is not a final decree as to the displaced liquidators from which they can appeal either in their official or individual capacities.—DUFOUR V. LANG, U. S. C. C. of App., 54 Fed. Rep. 915.

39. EVIDENCE — Incompetency of Fellow-servant. — Where, in an action against a railroad for injuries to a fireman, resulting from the collision of two trains, the claim is that the accident occurred through the incompetency of a drunken engineer, it is proper to show the engineer's habit in this regard, whether shown to have been communicated to defendant or not.—TEXAS CENT. RY. CO. V. ROWLAND, Tex., 22 S. W. Rep. 134.

40. FEDERAL COURTS—Receivers—Contempt.—Where a State officer who has seized under tax warrants property in the hands of a receiver of the United States Circuit Court, and who has disobeyed the order of the court that he release it forthwith, is committed for contempt, upon his application to the supreme court for the writ of *habeas corpus* the only question to

be considered is whether the order of commitment was void for want of power to make it.—EX PARTE TYLER, U. S. S. C., 13 S. C. Rep. 785.

41. FRAUDS STATUTE OF—Verbal Agreement.—Under the Texas statutes of frauds (Rev. St. art. 2464), a verbal agreement which, by a fair and reasonable interpretation, and in view of all the circumstances existing at the time, does not admit of performance, according to its language and intention, within a year from the time of its making is void.—WARNER V. TEXAS & P. RY. CO., U. S. C. C. of App., 54 Fed. Rep. 922.

42. FRAUDULENT CONVEYANCE — Consideration. —An insolvent bought certain land in consideration of his agreement to assume the mortgage debt, and, to place it beyond the reach of his creditors, had the deed made in the name of his wife, who did not know his financial condition or his fraudulent intent. The insolvent took up the old mortgage, and gave in its place a new note executed by himself and wife jointly, and secured by a mortgage on the land. It did not appear that the mortgagee requested the wife to sign, or refuse to accept the insolvent's note without her signature: Held, that as to the land, and against the insolvent's creditors, the wife was a mere volunteer, and the land was open to attachment by the creditors.—TRUMBULL V. HEWIT, Conn., 26 Atl. Rep. 350.

43. FRAUDULENT CONVEYANCE—Parties.—The insolvent is not a necessary party defendant to an action instituted by an assignee or receiver under the provisions of Gen. Laws 1881, ch. 148, § 4, to annul and avoid a conveyance of real property alleged to have been a fraudulent and forbidden preference of a creditor.—WILLIAMSON V. SELDEN, Minn., 54 N. W. Rep. 1055.

44. GIFT OF LAND—Evidence.—A father put his married daughter in possession of land, intending to give it to her when he should be able to pay off his debts, and she made improvements, but he died without having paid his debts, and disposed of it by will. The daughter after going into possession, gave her father rent notes, and signed a paper acknowledging to hold as tenant. The father paid the taxes: Held, that there was no gift of the land to the daughter.—BROWN V. BROWN, S. Car., 17 S. E. Rep. 452.

45. HOMESTEAD — Conveyance. — Where a husband and wife have resided on and occupied land as a homestead for two years prior to the filing of a bill to have set aside a conveyance of the land by the husband to the wife as in fraud of creditors, and the land sold to pay such creditors, the homestead cannot be disturbed.—WILCHER V. THOMAS, Miss., 12 South. Rep. 828.

46. INTEREST—Usury.—Where the original agreement for the loan of money fixed no rate of interest except by stipulating that the highest legal rate should be paid, subsequently giving a note for the money providing for usurious interest does not affect the validity of the debt.—JOHNSON V. HULL, Ark., 22 S. W. Rep. 176.

47. INTOXICATING LIQUORS — Sales to Minors.—A charge that, if the jury had a reasonable doubt as to whether the defendant had the written consent of the parent of the minor to sell him the liquor, they should acquit, was more favorable to defendant than authorized by law, as the burden of proof is on defendant in such case.—JONES V. STATE, Tex., 22 S. W. Rep. 149.

48. JUDGMENT—Confession—Married Woman.—Under Act June 3, 1887 (P. L. 332), which enables a married woman to acquire property and to contract in relation to her separate estate in the same manner as if she were a *feme sole*, a married woman's note, with power to confess judgment, given for money borrowed with which to pay off a lien on her separate estate, is valid, and judgment by confession entered thereon binds her separate estate.—ABELL V. CHAFFEE, Penn., 26 Atl. Rep. 364.

49. JUDGMENT — Setting Aside Default. — Rev. St. § 2832, provides that the court may in its discretion, and on such terms as may be just, at any time within one year after notice thereof, relieve a party from a judgment against him through his mistake, inadvertence, or excusable neglect: Held, that it was within the discretion of the court to open a default, though more than one year after the rendition of the judgment, where it appeared that the proceeding were instituted therefor when defendant had actual notice of the judgment.—TURNER V. LEATHEM, Wis , 54 N. W. Rep. 1001.

50. JUDGMENT AGAINST MARRIED WOMAN.— Where a judgment entered on a note is regular and valid on its face, and there is nothing in the record to indicate that defendant is a married woman, there is no reason for opening or striking off the judgment; and even if the contract of sale of the furniture, in payment for which the note was given, was tainted with fraud, defendant could not set this up as a defense to the judgment on her note after the contract had been fully executed by delivery of the goods to her. — ADAMS V. GREY, Penn., 26 Atl. Rep. 423.

51. JUSTICE OF THE PEACE—Continuance.—On application of the defendant, the plaintiff consenting thereto, a justice of the peace adjourned a suit pending before him for more than 90 days from the return day of the summons. Afterwards, on the day to which the cause stood adjourned, the defendant objected to the jurisdiction of the justice on the ground that the action had been continued beyond the 90 days limited by the statute, which objection was overruled: Held, that the adjournment did not operate as a discontinuance of the action, and that the defendant could not claim a dismissal by reason of the postponement of the trial at his own instance.—FISCHER V. COOLEY, Neb., 54 N. W. Rep. 960.

52. LIBEL—Evidence.—A publication, which charges a female of previous good repute for chastity with having traveled with a married man, and with having been turned out an hotel, and that the revelation has caused a sensation in the community where it transpired, is actionable libel. Evidence of specific acts of immorality committed by plaintiff, which were wholly disconnected with the acts charged in the publication, is not admissible under a plea of justification or character, and can be proved only by general reputation.—INDIANAPOLIS JOURNAL NEWSPAPER CO. V. PUGH, Ind., 33 N. E. Rep. 991.

53. LIBEL—Pleading.—A complaint in an action for libel alleged that defendant, who with two others constituted a town board of school trustees, before whom plaintiff's application for employment as a teacher was pending, filed his written protest before such board, objecting to plaintiff's employment in "false, malicious, and libelous language," viz: "For claiming wages not due her, and making statements which, in my opinion, she knew to be false, in order to obtain them:" Held, that the complaint was demurrable because it did not allege that the libelous words were uttered maliciously and without probable cause, since the word "maliciously," as used in the complaint, applied to the matter published, and not to the act of publishing.—HENRY V. MOBERLY, Ind., 33 N. E. Rep. 981.

54. LIFE INSURANCE—Wagering Policies.— In an action on a life insurance policy, it appeared that the insured took out the policy in her own name, and afterwards she delivered it to her daughter, with instructions to pay the premiums, pay the insured's funeral expenses, and that the balance should go to the daughter's child. The daughter paid the premiums as directed: Held, that the policy was not a wagering policy, and was valid.—BURKE V. PRUDENTIAL INS. CO., Penn., 26 Atl. Rep. 445.

55. LIMITATION OF ACTIONS — Under Mansf. Dig. § 4475, providing that no action for the recovery of lands, against any one who may hold the same under a tax sale, shall be maintained unless plaintiff was seised or possessed thereof within two years next preceding the commencement of the action, the recording of a tax deed, valid on its face, of unoccupied lands, will not set the statute running, but there must be two

years of actual, adverse possession.—GATES V. KELSEY, Ark., 22 S. W. Rep. 162.

56. LIMITATIONS—Changing Grade of Street.—A proceeding against a city to assess damages for cutting down the grade of a city street in front of plaintiff's premises must be commenced within six years after the work of excavation was done.—EISENHART V. CITY OF PHILADELPHIA, Penn., 26 Atl. Rep. 367.

57. LIMITATIONS—Concealment of Cause of Action.—Complainant was distinctly advised that property had been assigned to defendant for her benefit, and shortly told defendant of it, and he admitted the assignment, but said it was to pay debts to him, and not for her benefit: Held, that her failure to bring suit for an accounting for 20 years was a bar to her right of action, and a contention by her that the statute did not run because the facts were fraudulently concealed by defendant is untenable, it being sufficient that she knew she had a right of action.—LEACH V. MOORE, Ark., 22 S. W. Rep. 173.

58. MARRIED WOMAN — Abandonment of Husband—Deed.—Where a wife, two years after marriage, abandoned her husband and child, and never saw or held communication with them thereafter up to the time of her death, eight years later, a deed of her separate property, executed by her five years after leaving her husband, vested a good title in her grantee, though the husband did not join in the deed, since such facts show permanent separation, and since it is immaterial to the validity of the conveyance upon which rested the blame of the separation.—BENNETT V. MONTGOMERY, Tex., 22 S. W. Rep. 115.

59. MARRIED WOMEN — Liability for Necessaries. — Under the provisions of section 1, ch. 53, Comp. St., which declares "that all property of a married woman not exempt by law from sale on execution or attachment shall be liable for the payment of all debts contracted for necessaries furnished the family of said married woman after execution against her husband for such indebtedness has been returned unsatisfied," the wife is in fact surety for her husband, and judgment must be recovered against her before her separate estate can be levied upon and sold for such necessaries.—GEORGE V. EDNEY, Neb., 54 N. W. Rep. 986.

60. MASTER AND SERVANT — Assumption of Risk. — Plaintiff, an employee of defendant railroad company, and experienced in his business, while standing on a rail to steady it for a co-employee, whowas cutting it with a chisel, was struck in the eye by a splinter from the rail or chisel. It appeared that the chisel was a proper instrument for the work for which it was used, of good material, and, though somewhat battered from use, its condition was visible, and might have been known to plaintiff, who handled it every day in the course of his duties, if he had used ordinary care: Held to show no cause of action, in that plaintiff must be considered to have assumed the risks incident to its use. — FORDYCE V. STAFFORD, Ark., 22 Atl. Rep. 161.

61. MASTER AND SERVANT — Dangerous Premises.—Plaintiff, a carpenter, was injured while working on a coal dock by the engineer's unexpected movement of the machinery, and the consequent drawing of a cable which hung in one of the chutes. The dock was not in regular operation, but undergoing extensive repairs, about which plaintiff and the engineer were alike engaged. When the dock was in operation, the cable was always above the chute. The position of the cable at the time was not known to any of defendant's officers: Held, that defendant was not liable for failure to provide plaintiff a safe place in which to work.—PORTER V. SILVER CREEK & MORRIS COAL CO., Wis., 54 N. W. Rep. 1019.

62. MASTER AND SERVANT—Fellow-servant.—In an action by a servant against his master for personal injuries caused by the negligence of a superior servant, there is no liability where it appears that both servants were engaged in a common employment, and the direction given to plaintiff, by obeying which he was injured, was one appropriate for one fellow-servant to give another.—STUTZ V. ARMOUR, Wis., 54 N. W. Rep. 1000.

63. MASTER AND SERVANT—Fellow-servant.—The master is not liable to a servant for an injury resulting from the breaking of a defective plank selected by a fellow-servant to be used as a bridge on which to carry coal from a car to a shed, where the master had furnished a quantity of planks of different sizes and thicknesses some of which were of sufficient strength for such use, and it was the duty of the servants to select the planks to be used.—VAN DEN HUEVEL V. NATIONAL FURNACE CO., Wis., 54 N. W. Rep. 1016.

64. MASTER AND SERVANT—Fellow-servant.—While an experienced car inspector was at work, with a fellow-servant, repairing the draw-head of a baggage car, two passenger coaches which had been placed on a spur track, with air brakes set, moved on him, striking him in the back, and crushing him: Held, that the car inspector was not chargeable with the negligence of his fellow-servant in failing to set the hand brakes on the passenger coaches, or to block the wheels, as required by the rules of the company, where he was ignorant of the danger of working between coaches held by air brakes, and had not been furnished with the company's rules, though he had repeatedly applied to the foreman for them.—GULF, ETC. RY. CO. V. KIZZIA, Tex., 22 S. W. Rep. 110.

65. MECHANIC'S LIEN—Waiver of Right.—The statutory right of a mechanic or material-man to enforce a lien upon real property may be released and waived by an instrument in writing, supported by a money consideration therein expressed, the money being paid by third parties, who had acquired property rights in the premises, although a sum less than the amount due was actually paid.—BURNS V. CARLSON, Minn., 54 N. W. Rep. 1055.

66. MORTGAGE — Estoppel in Pais.—A father who is present when his son executes a mortgage on personal property, and who has previously informed the mortgagees that he has given the property to the son to enable him to mortgage it for supplies to make a crop, is estopped, as against the mortgagees, from asserting that the gift had not been completed by a technical delivery of the property.—FOREMAN V. WEIL, Ala., 13 South. Rep. 815.

67. MORTGAGE—Assignment—Bona Fide Purchasers. —The assignee of a mortgage cannot avail himself of the plea of *bona fide* purchaser, as against equities which existed against the mortgage in the hands of the mortgagee.—PATTERSON V. RABB, S. Car., 17 S. E. Rep. 463.

68. MORTGAGES—Foreclosure.—Where, after the issue of *scire facias* on a mortgage and entry of judgment, the land is sold under execution issued on a judgment junior to the mortgage, for an amount insufficient to pay all the liens, and the mortgagee releases the mortgagor from personal liability on the bond accompanying the mortgage, the mortgagor has no such interest as entitles him to open the judgment on the mortgage, and defend on the ground of usury.—REAP V. BATTLE, Penn., 26 Atl. Rep. 439.

69. MORTGAGE—Foreclosure by Advertisement.—The powers embraced in the proviso of section 5411, Comp. Laws, regulating foreclosures of mortgages by advertisement, construed: Held, that the several orders made by the judge of the district court in the above-entitled matters, directing the discontinuance of foreclosure proceedings by advertisement, and requiring that the further foreclosure proceedings of said mortgages be had in court, are valid orders; the same being based in each case upon an affidavit which was satisfactory to the judge who made the order, and which also set out such facts as are required by said proviso to be embodied in such affidavits.—MCCANN V. MORTGAGE, BANK & INVESTMENT CO., N. Dak., 54 N. W. Rep 1026.

70. MORTGAGE—Foreclosure—Sale.—Purchasers at a foreclosure sale who are not parties to the suit become parties by signing the bid, and are liable to be pro-

ceeded against by petition for the specific performance of their contract.—BOORUM v. TUCKER, N. J., 26 Atl. Rep. 456.

71. MORTGAGE FOR PURCHASE MONEY.—On the foreclosure of a mortgage the mortgagor cannot offset moneys that are claimed to be due for taxes existing as liens upon the property at the time the premises were conveyed to him by the mortgagor, his deed containing no covenant against incumbrances.—BANDENDISTEL v. ZABRISKIE, N. J., 26 Atl. Rep. 455.

72. MORTGAGE OF CROPS—Title.—A person in possession of land as purchaser, for the payment of which he has given notes, has such an interest in the land as will entitle him to mortgage growing crops thereon.—RUSSELL v. STEVENS, Miss., 12 South. Rep. 830.

73. MORTGAGE — Receiver. — An appearance for any other purpose than to question the jurisdiction of the court is general, and gives the court jurisdiction of the person. A receivership to a suit to foreclose a mortgage on property of a corporation will not prevent another receivership, under Gen. St. 1878, ch. 76, in proceedings to sequestrate all the property and effects of the corporation for the benefit of all its creditors.—ST. LOUIS CAR CO. v. STILLWATER ST. RY. CO., Minn., 54 N. W. Rep. 1064.

74. MORTGAGES—Stipulation as to Attorneys' Fees.—A bill for the foreclosure of a mortgage which alleges that the mortgagee is not authorized to purchase by the power of sale, and that no third person would become a bidder at a sale under the power because of the denial of the validity of the mortgage by the mortgagors, sufficiently shows a necessity for resort to foreclosure by action to warrant the allowance of an attorney's fee under a stipulation in the mortgage to pay such fee if it shall become "necessary to employ an attorney to foreclose this mortgage."—MCCALL v. AMERICAN FREEHOLD LAND MORTG. CO., Ala., 17 South. Rep. 806.

75. MUNICIPAL CORPORATIONS—Change of Grade.—Under Gen. St. § 2703, providing that, where the abutting owner shall sustain special damage by a change of grade of highway, the borough making the change shall be liable therefor, an abutting owner can recover as special damages the value of a sidewalk previously constructed, and which was destroyed by the change of grade.—SHELTON CO. v. BOROUGH OF BIRMINGHAM, Conn., 26 Atl. Rep. 348.

76. MUNICIPAL CORPORATION — City Officer. — The president of the city council of the city of Minneapolis is not an "officer" of the city, within the meaning of either the city charter or article 13, § 2, of the constitution, but merely an officer or servant of the city council which elected him, and as such, according to the rules of parliamentary law, is removable at the will or pleasure of that body.—STATE v. KIICHLI, Minn., 54 N. W. Rep. 1069.

77. MUNICIPAL CORPORATION—Control of Streets.—A city which by ordinance granted to a street-railway company the right to lay tracks on one of its streets may revoke such grant by repealing the ordinance, even after the track has been laid, when, in the judgment of the city council, the public safety and convenience, and the proper regulation of the use of the street, require it.—LAKE ROLAND EL. RY. CO. v. MAYOR, Md., 26 Atl. Rep. 510.

78. MUNICIPAL CORPORATION — Injunction—Electric Railway in Streets.—On an appeal to the circuit court of appeals from an interlocutory order granting an injunction, the right of the complainant to other relief demanded by his bill cannot be considered when the same has not yet been passed upon by the court below; and the only question before the appellate court is the propriety of the injunction.—HART v. BUCKNER, U. S. C. C. of App., 54 Fed. Rep. 925.

79. MUNICIPAL CORPORATION—Ordinances.—A grant by a city charter of the right to regulate the vending of meats brought into the city for sale, and to license, tax, and regulate butchers, etc., authorized the adoption of appropriate ordinances to prevent the retailing of meats from 4 P. M. to 9 A. M., except by persons duly licensed therefor.—PORTER v. CITY OF WATER VALLEY, Miss., 12 South. Rep. 828.

80. MUNICIPAL CORPORATION—Market.—The lessee of a stall in a city market has no such estate therein as will sustain an action of trespass by him against a railroad company that takes possession thereof by virtue of a bond given to the market company.—STRICKLAND v. PENNSYLVANIA R. CO., Penn., 26 Atl. Rep. 431.

81. NEGOTIABLE INSTRUMENT—Conversion of Note.—Where a negotiable instrument is assigned as a mere security for a debt, the purpose for which the assignment was made may be proved to show the true nature of the transaction.—CORTELYOU v. HIATT, Neb., 54 N. W. Rep. 964.

82. NEGOTIABLE INSTRUMENTS—Fraud.—The fact that one may have been induced by fraud to indorse certain notes and drafts for another does not affect a note and mortgage given by the former to a third person to raise the money necessary to meet obligations thereon, there being no fraud between the maker and the payee of the latter note, and full value being received.—ROSS v. WEBSTER, Conn., 26 Atl. Rep. 476.

83. NUISANCE—Injunction.—Independently of statutory provisions, the only ground upon which a court of equity will enjoin the maintenance of a nuisance in a private suit by a corporation is special injury to the property of such corporation, and no corporation has such property in its workman or in their services that it can, under the ordinary jurisdiction of the court of chancery, maintain a suit as for nuisance against the keeper of a house at which they voluntarily buy intoxicating liquors; and thereby get so drunk as to be unfit for work.—NORTHERN PAC. R. CO. v. WHALEN, U. S. S. C., 13 S. C. Rep. 822.

84. NEGOTIABLE INSTRUMENT — Promissory Note — Consideration.—The release of a claim, in good faith, of a future contingent interest in certain land under the will of a deceased ancestor, is sufficient consideration for a note given therefor, whether he in fact had any interest in the land or not. — BROOKS v. WAGE, Wis., 54 N. W. Rep. 997.

85. OBSTRUCTION OF NAVIGABLE STREAM.—The owner of land near, but not adjoining, a navigable stream cannot maintain an action for damages for the obstruction of the stream by a viaduct, unless he has sustained some special damage thereby, distinct from that of the public at large.—POTTER v. INDIANA & L. M. RY. CO., Mich., 54 N. W. Rep. 956.

86. PARDON OF CONVICT—Violation of Conditions.—A convict who has received and accepted a conditional pardon cannot be arrested and remanded to suffer his original punishment because of an alleged non-performance of the condition, upon the mere order of the governor. He is entitled to a hearing before the court in which he was convicted, or some superior court of criminal jurisdiction, and an opportunity to show that he has performed the condition of his pardon, or that he has a legal excuse for not having done so.—STATE v. WOLFER, Minn., 54 N. W. Rep. 1065.

87. PARTNERSHIP.—In an action against a partnership, charging fraud in concealing name of K, who, it was claimed, was the real partner, and screening him from liability, evidence of a conversation of a clerk in the employ of one of the other partners that he went to K, and proposed to him a partnership with his employer; that, after considering it several days, K said he would form the partnership, but that he would have to put another man in his place, and mentioned H, who would represent his interest in the concern—was admissible to show that K was the real partner.—WEBB v. JOHNSON, Mich., 54 N. W. Rep. 947.

88. PARTNERSHIP—Action against Surviving Partner. —It is no defense to an action against the surviving partner on a lost note and an account against the firm that the deceased partner, by will, empowered the survivor and others, as executors, to manage the firm

business, and close it out as rapidly as possible, and that defendant has accordingly surrendered to such executors all the assets of the firm. — DULANEY V. WALSHE, Tex., 22 S. W. Rep. 131.

89. PAYMENT BY CHECK — Diligence in Collection. — A check drawn by defendants in Philadelphia on a bank there, and there delivered to an agent of plaintiff, a resident of New York, was taken by the agent on the same day to New York, and delivered to plaintiff, who on the following day placed it in bank for collection. The drawee bank having failed after the check was given, it was not paid: Held, that it was properly held, as a matter of law, that plaintiff exercised due diligence. — ROSENTHAL V. EHRLICHER, Penn., 26 Atl. Rep. 435.

90. PAYMENT — Receipt — Parol Evidence.—The fact that a receipt has been given for a gross sum represented by cash and the paper of third persons is not conclusive that such paper has been accepted as absolute payment, in the absence of a recital to that effect in the receipt; and parol evidence is admissible to show that such paper was in fact received as payment only on condition that it was good.—SHEPHERD V. BUSCH, Penn., 26 Atl. Rep. 363.

91. PRINCIPAL AND AGENT.—Where a married woman conveys land to her father, without valuable consideration, to enable her to borrow money on it, brokers who assist them in preparing the security are not the agents of a corporation which finally accepts the mortgage and pays the money, so as to charge it with the brokers' knowledge that the arrangement was an attempted evasion of the laws of the State prohibiting the mortgaging of the statutory separate estate of a married woman. — ALLEN V. MCCULLOUGH, Ala., 12 South. Rep. 810.

92. PRINCIPAL AND SURETY — Contribution. — W, R, and plaintiff executed a note to a bank to procure a loan to W, plaintiff and R being sureties. The bank required another surety for the three makers. Thereupon W asked defendant to sign as surety for the principals, who, he said, had executed the note jointly and severally, and defendant wrote his name below the signatures of the others, prefixing the word "Surety." W became bankrupt, and the bank obtained a judgment against plaintiff, defendant, and R, the amount of which was paid by plaintiff and R, and plaintiff sued for contribution: Held, the defendant was a surety for plaintiff and R, and not a cosurety with them for W, and was not liable to contribution.—BULKELEY V. HOUSE, Conn., 26 Atl. Rep. 352.

93. PRINCIPAL AND SURETIES—Discharge of Sureties.—An agreement entered into, before the execution of a note, between the principal maker and the payee, for a higher rate of interest than fixed in the note, cannot affect the rights of the sureties, who were not parties to it; and the payment of increased interest in consideration of the extension of the time of payment, granted without the consent of the sureties, discharges them from liability.—BROWN V. FOUNTAIN, Tex., 22 S. W. Rep. 129.

94. PRINCIPAL AND SURETY — Equity.—Mansf. Dig. §§ 6396, 6397, providing that a surety may maintain an action against his principal to obtain indemnity before the debt is due whenever any of the grounds exist on which an order may be made for attachment, and that in such action the surety may obtain any of the provisional remedies allowed, and on the ground and in the manner prescribed by law, are merely declaratory of the right of the surety to exoneration, and supplementary to the equitable remedy previously provided for his enforcement, and therefore such an action, without regard to the amount involved, is within the equitable jurisdiction of a circuit court.—UPTMOOR V. YOUNG Ark., 22 S. W. Rep. 169.

95. PUBLIC LAND — Pre-emption of State Lands.—Where the field notes of the survey made under a pre-emption are returned to the general land office within a year after the survey, as required by law, yet, if they are returned before another attempts to pre-empt the land, the first pre-emption right is not forfeited, and is superior to the subsequent attempted pre-emption.—KINSEY V. SASSE, Tex., 22 S. W. Rep. 128.

96. RAILROAD COMPANY—Electric Street Car—Contributory Negligence.—It is not contributory negligence, as a matter of law, for a person to drive on a street occupied by an electric railway, even though the cars cause noise calculated to frighten horses, and the space between the track and the retaining wall is narrow.—GIBBONS V. WILKESBARRE & S. ST. RY. CO., Penn., 26 Atl. Rep. 417.

97. RAILROAD COMPANY — Street Railroads—Sale of Tickets.—A reservation, in an ordinance granting a franchise to a street railroad company, of the right by the city to make such further regulations as may be deemed necessary to protect the interests of the public, includes the right to enact an ordinance providing that the company shall, for the accommodation of the public, keep tickets for sale on its cars.—CITY OF DETROIT V. FT. WAYNE & B. I. RY. CO., Mich., 54 N. W. Rep. 958.

98. RAILROAD COMPANIES—Stock-killing Cases.—In an action against a railroad company for stock killed on its track in the night-time the engineer testified that the accident occurred near a creek, where a heavy fog prevailed; but he admitted that no fog prevailed at other creeks in the vicinity crossed by his train: Held, that defendant, after examining the engineer to show that the conditions for fog were more favorable at the place of the accident than at other creeks, and after receiving unfavorable answers, was not entitled to have such answers striken out for irrelevancy.—CENTRAL RAILROAD & BANKING CO. OF GEORGIA V. INGRAM, Ala. 12 South. Rep. 801.

99. RECEIVERS—Railroad Mortgages.—In proceedings to foreclose a railroad mortgage it is error to decree priority over the mortgage debt to a claim for rental of cars, accruing during the six months preceeding the appointment as a receiver in the foreclosure proceedings; especially where the car company had expressly reserved the right to terminate the lease upon the railroad's failure to pay promptly the interests on its bonds and other liabilities, and the officers of the car company were also officers of the railroad company, and were hence chargeable with notice of the financial condition of the latter.—THOMAS V. WESTERN CAR CO., U. S. S. C., 13 S. C. Rep. 824.

100. REPLEVIN—Rescinding Sale for Fraud.—Where goods are sold upon credit induced by the fraudulent representations of the vendee as to his solvency or ability to pay for the goods bought, the vendor may rescind the sale upon the discovery of the fraud, and replevin the goods.—MCKINNEY V. FIRST NAT. BANK OF CHADRON, Neb., 54 N. W. Rep. 963.

101. SALES BY ASSIGNEE—Purchaser.—A purchaser at assignee's sale is not bound to take the property where there were irregularities in the sale, affecting the title, or the sale has not been reported for conformation.—RAMSAY V. HERSKER, Penn., 26 Atl. Rep. 433.

102. SALE BY SAMPLE — Refusal to Accept Goods.—Where one who has bought goods by sample refuses to accept same because not as represented, and, on being notified of the vendor's intention to resell, fails to give any instructions as to the sale, the matter is within the reasonable discretion of the vendor; and the fact that the goods might have brought a better price if offered in smaller lots, or in a different place, cannot be urged in defense of a suit brought by the seller for the difference in price obtained on the resale.—PENN V. SMITH, Ala., 12 South. Rep. 818.

103. SALE—Loss in Transit—Insurance.—A merchant in Philadelphia contracted with a manufacturer in New York for the purchase of goods to be shipped as wanted. The contract did not state how the goods were to be shipped, nor whether they were to be insured. Four shipments were made. Each time the purchaser designated the vessel on which they were to be shipped. In ordering one shipment the purchaser said nothing about insurance and no insurance was effected. In the three other cases he ordered the seller

to insure. The seller insured twice, but neglected to do so the third time, and on that voyage the goods were lost: Held, that the neglect to insure deprived the seller of the right to payment for the goods so lost, since the dealings of the parties showed that he was obliged under the contract to insure when requested to do so.—NEW YORK TARTAR CO. v. FRENCH, Penn., 26 Atl. Rep. 425.

104. STATE TREASURER—Interest on Deposits.— The State treasurer and the sureties on his official bond are liable to the State for interest received by the former from banks on State funds deposited therein by him, in his name, as such treasurer, with interest thereon from the close of his official term.—STATE v. MCFETRIDGE, Wis., 54 N. W. Rep. 997.

105. SUMMONS — Issuance in Blank. —A summons signed and sealed in blank by the clerk of the court, and delivered to an attorney, not for a particular suit, but for any suit that he might have occasion to bring thereafter, is not void, and the suit should not be quashed on the ground that summons was not legally issued.—SWEET v. NEWAYGO CIRCUIT JUDGE, Mich., 54 N. W. Rep. 951.

106. TAX DEED—Description.—A description in a tax deed is sufficient to support adverse possession by the grantee therein if, unaided by extrinsic facts, it satisfies the mind that the land adversely occupied is embraced within the description contained in the deed.—DAY v. NEEDHAM, Tex., 22 S. W. Rep. 103.

107. TAXATION— Assessment.—An unknown owner of assessed immovable property is one who has no agent to represent him, and whose place of business, residence, and post-office address are not known to the tax collector.—WEBRE v. LUTCHER, La., 12 South. Rep. 834.

108. TAXATION—Corporations.—Under the act of the legislature imposing taxes upon certain corporations and providing for the collection thereof, the only power given to, or duty imposed upon, the court of chancery is to issue an injunction when the attorney general presents a proper case. — IN RE ELECTRO PNEUMATIC TRANSIT CO., N. J., 26 Atl. Rep. 463.

109. TELEGRAPH COMPANIES—Conditions.—In an action for delay in the transmission of a telegram not written on one of the company's printed blanks, nor attached thereto with the sender's knowledge or consent, evidence is not admissible to show a regulation by the company requiring all messages presented to it to be attached to one of its printed blanks containing the condition on which it receives messages for transmission, since the agents of the company may bind it without imposing the conditions contained in the special contracts evidenced by its blanks. WESTERN UNION TEL. CO. v. ARWINE, Tex., 22 S. W. Rep. 105.

110. TENDER — Acceptance.— A plea of tender is an offer to pay plaintiff the sum named, in satisfaction of the whole claim advanced in the complaint; and plaintiff's acceptance, by the withdrawal of the money from the court, is a liquidation of the demand, irrespective of the grounds on which defendant declines to pay, and proposes to deny his liability for the balance. GARDNER v. BLACK, Ala., 12 South. Rep. 813.

111. TOWNS — Defective Highways — Where a town changes the course of a highway crossing a river over which it erects a new bridge, leaving the old bridge in a defective condition, a failure to erect and maintain a barrier at the intersection of the old and new roads warning travelers of the change is a defect in the highway which renders the town liable for any injury caused thereby, where both roads at the intersection present the appearance of the traveled highways.—SCHUENKE v. TOWN OF PINE RIVER, Wis., 54 N. W. Rep. 1057.

112. TRESPASS TO TRY TITLE— Separate Property.— Where lots are conveyed to a married man, who dies without issue, and on whose estate there is no administration, a purchaser of such lots for value from the surviving wife, and his grantee, will be protected in their title against the heir of the husband, in the absence of actual or constructive notice to such purchaser of facts constituting the lots the separate property of the husband.—SANBURN v. SCHULER, Tex., 22 S. W. Rep. 119.

113. TRIAL— Misconduct of Judge. — Rev. St. § 539, providing, *inter alia*, that "the officer having the jury in charge shall not suffer any communication to be made to them, or make any himself, except to ask them if they have agreed upon their verdict, unless by order of the court," only authorizes the presiding judge to communicate with the jury, through the bailiff, as to formal matters, and does not authorize him to personally communicate with them, in their jury room, while considering their verdict.—DANES v. PEARSON, Ind., 33 N. E. Rep. 976.

114. TRUST—Express Trust.—An express trust in favor of the grantor cannot be ingrafted on a conveyance, absolute in its terms, either by oral proof, or, under the doctrine of "part performance," by proof that the grantor, with the consent of the grantee, remained in possession, and expended money in betterments. — PILLSBURY-WASHBURN FLOUR-MILLS CO. v. KISTLER, Minn., 54 N. W. Rep. 1063.

115. TRUSTS— Insolvency of Estate.— A trustee empowered by will to sell the property of the estate, and to invest the proceeds for the benefit of the estate, has no power, after both the estate and himself have become insolvent, to convey the bulk of the estate to a creditor in payment of a judgment confessed in his favor.—YOUNG v. WEED, Penn., 26 Atl. Rep. 420.

116. WATER COMPANIES—Condemnation of Land.—A petition, in condemnation proceedings by a water company for a right of way through certain lands, alleging an intention of the company to convey water for drinking and sanitary purposes to the inhabitants of Milwaukee by a pipe line extending from its springs "to the limits of the city," is demurrable where it does not show that the company has the right to so supply the city or its inhabitants, since the right of the company to condemn is dependent on such public use.—WISCONSIN WATER CO. v. WINANS, Wis., 54 N. W. Rep. 1003.

117. WILL—Construction — Trusts.—By her original will, testatrix bequeathed the remainder of her property in trust, the annual income therefrom to be paid to two of her grandchildren, R and F, during the lifetime of her son-in-law L, the father of R and F, and if at the death of L his estate be divided "about equally" among his four children, R, F, O, and M, then that the estate devised in trust be equally distributed among the four grandchildren; otherwise such trust estate be equally divided between R and F only. By several codicils the amount payable to R from the income was limited, and accumulations were provided for, which were held to be void as contrary to law: Held that, the provision of the codicils being void, the provisions of the will were operative, and the income from the trust estate is payable to R and F only during the life of L.—IN RE SHARP'S ESTATE, Penn., 26 Atl. Rep. 441.

118. WILL—Contest—Evidence.—In a proceeding to probate a will, the fact that the testatrix was the wife of the legatee does not, *per se*, raise the presumption of fraud or undue influence, so as to shift the burden of proof on the proponent.—BULGER v. ROSS, Ala., 12 South. Rep. 803.

119. WILLS—Construction — Charitable Bequests.—A bequest made, without limitation as to its use, directly to an unincorporated, but regularly organized and well-established, charitable association, is valid.—HADDEN v. DANDY, N. J., 26 Atl. Rep. 404.

120. WILLS—Construction—Heirs.—Where money or personal property is bequeathed to the heirs of A or the heirs of the testator, if there be nothing in the will to show that the testator used the word "heirs" in a different sense, the next of kin are entitled to claim under such description, they being the persons appointed by law to succeed to the personal property.—REEN v. WAGNER, N. J., 26 Atl. Rep. 467.